Supreme Court, U.S.
FILED
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No. _____

In The
Supreme Court of The United States
October Term 1997

JIM POPE, as Sheriff, et al.
Petitioners,

v.

ROLLAND RICHARD HENRY
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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83 pp

QUESTION PRESENTED

1. Whether a municipality should be liable under 42 U.S.C. § 1983 for an official policy or custom based upon incidents which take place *after* the event upon which the plaintiff's claim is based, in the absence of other evidence that a municipal policymaker was aware of the incidents and did nothing to end them.

LIST OF PARTIES

Petitioners herein are:
JIM POPE, Sheriff of Shasta County
THE COUNTY OF SHASTA, CALIFORNIA

Other defendants in this action are:
California Highway Patrol Officers AC. CHAIDEZ, and H. SMITH.

The respondent herein is:
ROLLAND RICHARD HENRY

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINION BELOW vii

JURISDICTION vii

STATUTORY PROVISION INVOLVED vii

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 4

1. The Decision Below Concerning Post-Event Evidence Raises A Significant And Recurring Issue Which Conflicts With The Decisions Of Other Circuit Courts Of Appeals And Is Ripe For Review 4

2. The Ninth Circuit's Post-Event Rule Conflicts With This Court's Requirement That Municipal Liability Be Based Upon Actions Taken With Deliberate Indifference 6

3. The Decision Below, If Not Reversed, May Preclude The Use Of Summary Judgement To Dispose Of Non-Meritorious Municipal Liability Allegations 7

4. The Decision Below Concerning Plaintiff's Burden Of Proof For Municipal Liability Allegations Is In Conflict With An Applicable Decision Of This Court 9

CONCLUSION 11

APPENDICES

TABLE OF AUTHORITIES

Page

Anderson v. Kern County
45 F3d. 1310, 75 F.3d 448 (9th Cir. 1995)
cert. denied 516 U.S. 919, 116 S.Ct. 306
133 L.Ed.2d 21 (1995) 8

Andrews v. Fowler
98 F.3d 1069 (8th Cir. 1996) 5

Bd. of County Commissioners of Bryan County, Oklahoma v. Jill Brown et al., ___ U.S. ___,
117 S.Ct. 1382, 137 L.Ed.2d 626 (1997) 7, 10

Bordanaro v. McLeod
871 F.2d 1152 (1st Cir. 1989)
cert. denied, sub nom City of Everett, Mass. v. Bordanaro, 493 U.S. 820, 110 S.Ct. 75
107 L.Ed.2d 42 (1989) 5

City of Canton v. Harris
489 U.S. 378, 109 S.Ct. 1197,
103 L.Ed.2d 412 (1989) 7

County of Riverside v. McLaughlin
500 U.S. 44 (1991) 2

Grandstaff v. City of Borger, 767 F.2d 161
(5th Cir. 1985) 5

Jones *v. City of Chicago*
787 F.2d 200 (7th Cir. 1986) 5

Larez v. City of Los Angeles
946 F.2d 630 (9th Cir. 1991) 5

Monell v. Department of Social Services
436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) . . . 4, 7

Parrish v. Luckie
963 F.2nd 201 (8th Cir. 1992) 5

Pembaur v. Cincinnati
475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986) 4

Wright v. Sheppard
919 F.2d 665 (11th Cir. 1990) 5

Petitioners, Jim Pope, Sheriff of Shasta County, and the County of Shasta respectfully petition for a writ of certiorari to review the judgement of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The court of appeals' March 2, 1998 Order amending its published opinion (Apdx. A) is reported at 137 F.3d 1372. The original opinion of the court of appeals (Apdx. B) is reported at 132 F.3d 512. The district court's order of August 11, 1995 granting summary judgement for defendants (Apdx. C) is unreported.

JURISDICTION

The court of appeals issued its published decision on December 23, 1997 (Apdx. B). Petitioners timely sought re-hearing. The court of appeals rendered its Order denying the petition for rehearing on March 2, 1998 (Apdx. A). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The underlying action was based upon the Civil Rights Act of 1871, 42 U.S.C. § 1983. Section 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the

jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . "

STATEMENT OF THE CASE

At 9:55 at night on May 13, 1993 Rolland Richard Henry was stopped by California Highway Patrol Officer A.C. Chaidez because of non-functioning tail lights and Henry's failure to wear seat belts. Officer Chaidez issued a Notice To Appear "traffic ticket." Henry refused to sign the notice to appear and demanded instead that he be taken to a magistrate.

Officer Chaidez explained that the Shasta County courts were not in session at night, no magistrate was available, and that pursuant to California Vehicle Code, § 40307 (Apdx. D), if Henry did not sign the notice to appear he would be taken to a local jail. Henry continued to refuse to sign the ticket.

Officer Chaidez then radioed his supervisor, Sergeant H. Smith. Sergeant Smith traveled to the location of the traffic stop and spoke with Henry concerning the consequences of his failure to sign the notice to appear. Nevertheless, Henry continued to refuse. At approximately 11:00 p.m. Henry was taken into custody according to California statute and transported to the Shasta County Jail. (The 1993 version of California Penal Code § 853.5 is attached as Appendix E).

During the booking process, pursuant to California statute, Henry was offered the opportunity to sign a jail "promise to appear" form to be released on his own recognizance. Henry refused. Henry was also offered the opportunity to post a minimal bail. Again, Henry refused. When a jail nurse attempted to ask Henry medical intake questions as required by California Code of Regulations, Title 15 § 1207 (Apdx. F), Henry refused to cooperate. Although he

claimed to have heart problems, Henry declined to complete the jail's intake medical questionnaire.

The jail nurse became concerned about Henry's bizarre behavior, and instructed Officer Chaidez to transport him to the Redding Medical Center to obtain a physician's clearance prior to completing the booking process. However, Henry refused to cooperate with the attending emergency room physician. Thereafter Henry was returned to the jail, his street clothing removed, he was provided a mattress and blanket, and at approximately 1:00 a.m. placed into a medical safety cell. Fifteen minute custody safety checks began, thirty minute nursing checks were initiated, and the jail physician notified.

At approximately 11:00 a.m. Henry agreed to cooperate concerning the booking process, including answering medical questions. At 1:30 p.m. that afternoon Henry was brought before a Shasta County commissioner conducting infraction arraignments and released on his own recognizance, well within the time requirements established in *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) and well within California's statutory standard for prompt arraignment (Apdx. G).

Henry filed this § 1983 action on December 30, 1993 alleging violations of his rights under the First, Fourth, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. His complaint also did *not* challenge the constitutionality of the California statutes cited above (Apdx. C-54, 52-53), and Henry did *not* name as defendants any of the individuals he encountered while in jail or at the hospital.

Instead, Henry sought damages from municipal defendants, Jim Pope, as Sheriff of Shasta County, and the County of Shasta, California.

On October 12, 1994 Henry's motions for class certification and for preliminary injunction were denied by the district court. On January 3, 1995, more than one year after the complaint was filed, and after Henry had taken no action to identify the "doe" defendants cited in the complaint, petitioners moved for summary judgement.

Instead of filing an opposition to summary judgement, Henry sought repeated continuances from the district court (Apdx C-45-51). After months of delay the only evidence finally submitted to the district court by Henry was his declaration and his wife's declaration in support of Henry's own Rule 56(f) motion (Apdx. C-50). Sanctions were imposed. On August 11, 1995 the district court granted the County's motion for summary judgement, holding that Henry failed "to come forward with any evidence to support a municipal liability claim" (Apdx C-56). Henry appealed; however, *his opening brief made no argument at all about the liability of Sheriff Pope and the County of Shasta* (Apdx. B-33, fn. 1).

Nevertheless, the Ninth Circuit Court of Appeals, in a published opinion by Judge Stephen Reinhardt (dissent by Judge Pamela Rymer), reversed the summary judgement granted by the district court, holding that evidence which alleges unconstitutional conduct by municipal employees *after* the date of plaintiff's claims is admissible and may be highly probative for proving the existence of a municipal defendant's

policy and custom.

In so doing, Judges Reinhardt and Boochever relied upon the declarations of Michael May and Robert Burns, declarations submitted by Henry in support of his earlier unsuccessful motion for class certification that *were not before the district court on summary judgment* (Apdx C-50). May and Burns alleged that several months *after* Henry's detention, they refused to sign notice to appear traffic tickets and were arrested and subsequently transported to the Shasta County Jail. When they refused to cooperate during the booking process and refused to answer medical intake questions, they claimed that they were placed into safety cells. No evidence had been submitted in the district court, and no evidence was before the Ninth Circuit, that Sheriff Pope or the County of Shasta were aware of these incidents, if indeed any constitutional deprivation resulted from the events alleged by May and Burns.

REASONS FOR GRANTING THE PETITION

1. The Decision Below Concerning Post-Event Evidence Raises A Significant And Recurring Issue Which Conflicts With The Decisions Of Other Circuit Courts Of Appeals And Is Ripe For Review.

A municipality cannot be held liable under Section 1983 simply because it employs tortfeasors. *Monell v. N.Y. City Dept. Of Human Services*, 436 U.S. 658, 692, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978). Instead, the plaintiff must identify a municipality's "policy" or "custom" that caused the injury. *Pembaur v. Cincinnati*, 475 U.S. 469, 480-481, 106

S.Ct. 1292, 1298-1299, 89 L.Ed.2d 452 (1986).

Contentions that a municipality's policy or custom may be proven by the misconduct of municipal employees which takes place *after* the event upon which the plaintiff asserts his claim have been raised in a significant number of Section 1983 actions. Three circuits reject the post-event doctrine in its entirety and require a *prior* pattern of unconstitutional conduct. *Andrews v. Fowler*, 98 F.3d 1069, 1075 (8th Cir. 1996); *Parrish v. Luckie*, 963 F.2nd 201, 204 (8th Cir. 1992); *Jones v. City of Chicago*, 787 F.2d 200, 207 fn. 8 (7th Cir. 1986); *Wright v. Sheppard*, 919 F.2d 665, 674-75 (11th Cir. 1990). Two other circuits, and the Ninth Circuit itself, recognize a limited application of the post-event rule under circumstances clearly distinct from those at bar -- where the policymaker was aware of the incident and did nothing to end it, or where the policymaker subsequently embraced the incident. *Grandstaff v. City of Borger*, 767 F.2d 161, 171 (5th Cir. 1985); *Bordanaro v. McLeod*, 871 F.2d 1152, 1166-1167 (1st Cir. 1989), *cert. denied*, *sub nom* *City of Everett, Mass. v. Bordanaro*, 493 U.S. 820, 110 S.Ct. 75, 107 L.Ed.2d 42 (1989); *Larez v. City of Los Angeles*, 946 F.2d 630, 645 (9th Cir. 1991).

In direct conflict to this precedent, the decision below creates a generalized post-event "rule" as follows:

> "[W]e reiterate our rule that post-event evidence is not only admissible for purposes of proving the existence of a municipal defendant's policy or custom, but may be highly probative with respect to that inquiry" (Apdx.

A-2-3).

Judge Reinhardt's undue and unprecedented expansion of the post-event doctrine renders this issue ripe for review.

2. The Ninth Circuit's Post-Event Rule Conflicts With This Court's Requirement That Municipal Liability Be Based Upon Actions Taken With Deliberate Indifference.

The Court recently affirmed that, quite apart from the state of mind required to establish the underlying constitutional violation, a plaintiff who seeks to establish municipal liability based upon the theory that a facially lawful municipal action has led an employee to violate a plaintiff's rights must demonstrate that the municipal action was taken with "deliberate indifference" as to its known or obvious consequences. *Bd. of County Commissioners of Bryan County, Oklahoma v. Jill Brown et al.*, ___ U.S. ___ , 117 S.Ct. 1382, 1390, 137 L.Ed.2d 626 (1997).

Deliberate indifference requires knowledge of a serious problem and the subsequent failure to correct that problem *at the time that the incident took place.* Thus, the requisite state of mind inquiry of the responsible municipal policymaker must focus upon the alleged deprivation -- not upon incidents which take place several months later. To avoid summary judgement concerning his claim of municipal liability, Henry was obligated to submit at least some evidence demonstrating deliberate indifference on the part of Sheriff Pope and the County of Shasta *concerning his own detention.* This of

course, Henry failed completely to do (Apdx C-45-51).

Absent special facts which were not present in this case, e.g. acts of affirmation by the policymaker of unconstitutional conduct, isolated instances of post-event conduct by municipal employees of the type relied upon in the decision below are simply not sufficient to raise a triable issue of fact given the culpability requirement set forth by the Court in *Monell v. Department of Social Services*, *supra*, 436 U.S. at 692, 98 S.Ct. at 2036, and *City of Canton v. Harris*, 489 U.S. 378, 382, 109 S.Ct. 1197, 1206, 103 L.Ed.2d 412 (1989).

3. The Decision Below, If Not Reversed, May Preclude The Use Of Summary Judgement To Dispose Of Non-Meritorious Municipal Liability Allegations.

To successfully oppose summary judgement concerning his claim of municipal liability, Henry was obligated to submit some evidence that the policymakers he named as defendants had knowledge of the alleged custom or policy which caused the unconstitutional deprivation of which he complains. The record is undisputed, Henry failed completely to submit any such proof (Apdx. C-45-51).

As Judge Rymer's dissent in the decision below points out:

> "[P]ost-event evidence has *no* probative value on the *prior* existence of a custom or policy that caused constitutional injury to Henry in the absence of some *other* evidence showing that the policymaker was somehow aware of the

> incident yet did nothing to end it — or said something to embrace it. It is only the fact of inaction (or affirmation) in the face of knowledge that gives rise to an inference that the policy that was left in place was in place all along [emphasis in original] " (Apdx B-39).

The decision below, if not reversed, will allow a plaintiff like Mr. Henry to successfully oppose summary judgement simply by alleging that similar incidents have taken place after his lawsuit was filed. The practical result of this unrestrained application of the post-event doctrine is a new and expansive "inference" of municipal liability. As held in the decision below:

> "It is a reasonable inference — indeed, the only reasonable inference — that after Henry filed suit and successfully served process against the county, it knew about the alleged malfeasance of its employee in the jail. As we will explain more fully below, such 'post-event evidence' may be used to prove the existence of a municipal policy in effect at the time that Henry was detained" (Apdx. B-20).

The Ninth Circuit's new inference renders it extremely difficult, if not impossible, for a municipality to utilize summary judgement in the law enforcement context. Jails throughout the United States utilize safety cells and other forms of restraint to ensure the safety of inmates who behave in a bizarre, self-threatening, or violent manner. See, e.g. *Anderson*

v. Kern County, 45 F.3d 1310, 75 F.3d 448 (9th Cir. 1995), cert. denied 516 U.S. 919, 116 S.Ct. 306, 133 L.Ed.2d 21 (1995). Likewise, police officers must, on occasion, utilize force to preserve the public peace; and highway patrol officers must, on occasion, arrest individuals like Henry who drive their vehicles upon the public highways in violation of the law and refuse to sign notices to appear. To infer municipal liability simply because a safety cell is utilized after *a lawsuit has been filed,* and to thereby cite the existence of the very complaint at issue in the motion, *without more*, to deny a municipality's motion for summary judgement serves to defeat the purpose of the Federal Rules of Civil Procedure, Rule 56. In practice, this expansive Ninth Circuit inference will work only to delay the just and prompt termination of those Section 1983 municipal liability allegations which have no basis in fact.

4. The Decision Below Concerning Plaintiff's Burden Of Proof For Municipal Liability Allegations Is In Conflict With An Applicable Decision Of This Court.

In formulating its post-event attribution holding, the majority panel in the decision below failed to consider the full scope of the district court's summary judgement ruling, and improperly reversed. Their decision simply ignored the direct causal link requirements which Henry was obligated to at least raise to successfully avoid summary judgement concerning his claims of municipal liability, in direct conflict with an applicable decision of the Court.

"As our § 1983 municipal liability

> jurisprudence illustrates, however, it is not enough for a § 1983 plaintiff merely to identify conduct properly attributable to the municipality. The plaintiff must also demonstrate that, through its *deliberate* conduct, the municipality was the "moving force" behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights".

Bd. of the County Commissioners of Bryan County, Oklahoma v. Jill Brown et al., supra, 117 S.Ct. at 1388 (emphasis in original).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgement and opinion of the Ninth Circuit.

Dated: May 29, 1998

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ORDER DENYING REHEARING
FILED, MARCH 2, 1998
Page 2

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROLLAND RICHARD HENRY,	)	
Plaintiff-Appellant,	)	
	)	No. 95-16704
v.	)	D.C. No.
THE COUNTY OF SHASTA;	)	CV-93-02038-GEB
STATE OF CALIFORNIA;	)	ORDER
JIM POPE, as Sheriff;	)	
A.C. CHAIDEZ, Officer;	)	
and H. SMITH, Officer,	)	
Defendants-Appellees.	)	

BEFORE: BOOCHEVER, REINHARDT, and RYMER, Circuit Judges.

The opinion, which is reported at 132 F.3d 512 (9th Cir. 1997), is amended as follows:

(1) At page 519, second full paragraph, the first sentence is amended to read: "In holding that the May and Burns declarations may be used to establish municipal liability although the events related therein occurred after the series of incidents that serves as the basis of Henry's claims, we reiterate our rule that

post-event evidence is not only admissible for purposes of proving the existence of a municipal defendant's policy or custom, but may be highly probative with respect to that inquiry."

(2) Directly after the citation that follows the sentence in amendment (1), the following sentence is inserted: "When a county continues to turn a blind eye to severe violations of inmates' constitutional rights -- despite having received notice of such violations -- a rational fact finder may properly infer the existence of a previous policy or custom of deliberate indifference."

With these amendments, Judges Boochever and Reinhardt have voted to deny the petition for rehearing. Judge Reinhardt has voted to reject the suggestion for rehearing en banc and Judge Boochever so recommends. Judge Rymer has voted to grant the petition for rehearing and to accept the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no judge has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPINION
FILED, DECEMBER 23, 1997
PAGE 4

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROLLAND RICHARD HENRY,	)	
Plaintiff-Appellant,	)	
	)	No. 95-16704
v.	)	D.C. No.
THE COUNTY OF SHASTA;	)	CV-93-02038-GEB
STATE OF CALIFORNIA;	)	OPINION
JIM POPE, as Sheriff;	)	
A.C. CHAIDEZ, Officer;	)	
and H. SMITH, Officer,	)	
Defendants-Appellees.	)	

Appeal from the United States District Court for
the Eastern District of California
Garland E. Burrell, District Judge, Presiding

Argued and Submitted
December 12, 1996--San Francisco, California
Filed December 23, 1997

Before: Robert Boochever, Stephen Reinhardt, and
Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Reinhardt; Dissent by Judge Rymer

COUNSEL

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John K. Hoxie, Deputy Attorney General, Sacramento, California, for defendants-appellees State of California, A.C. Chaidez, and H. Smith.

Arthur Loyal Morgan, Jr., Halkides & Morgan, Redding, California, for defendants-appellees County of Shasta and Jim Pope.

OPINION

REINHARDT, Circuit Judge:

"Take me to your magistrate," Henry insisted, and the battle was on. It seems that Shasta County has a group of zealous citizens intent on ensuring that they and their associates are at all times afforded the full extent of their legal rights -- to the last jot and tittle -- and that all laws that affect them are strictly complied with, even in the case of minor vehicle code infractions. At the same time, according to the record as we must view it, the sheriff and certain other law enforcement officers who work in Shasta County take quite a different view of the legal process. As they see it, they are

the law in Shasta County.[1]

I. Facts

At 9:55 p.m. on May 13, 1993, Rolland Richard Henry was stopped by California Highway Patrol Officer A.C. Chaidez because the tail lights on his car were not functioning. Together, Henry and Chaidez checked the automobile's fuses, which they found to be in working order. Chaidez then issued Henry a "Notice to Appear," i.e., a traffic ticket, for the broken tail lights and for failing to wear his seat belt. See Cal.Veh. Code §§ 24252(a), 27315(d). When Chaidez asked Henry to sign the ticket, however, Henry refused, explaining that "according to the California Vehicle Code Section 40302(c), [he] had the right for a mandatory appearance before a magistrate to have a judicial determination made at that time and that [he] demanded to be taken forthwith." Chaidez said that no magistrate was available at that hour. Henry then explained that under California law a magistrate must be available at all times. See Cal. Penal Code S 810. In response, Chaidez told Henry that if he did not sign the ticket, he would be arrested and put in jail. When, despite that threat, Henry repeated his demand to be taken to a magistrate, Chaidez radioed Sergeant H. Smith

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[1]Because Henry appeals a grant of summary judgment in favor of the defendants, we must view all factual disputes in the light most favorable to Henry, and for purposes of this appeal, must accept Henry's version of the facts in dispute.

for assistance. When Smith arrived on the scene approximately thirty minutes later, Henry once again stated that he wanted to be taken to a magistrate without delay, in accordance with California law. Smith replied that "it might be the law, but it is not our (CHP) policy," and informed Henry that no magistrate would be available until the following day, so Chaidez would take him to jail if he refused to sign the ticket.[2] When Henry said that he was not refusing

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[2]Section 40307 of the California Vehicle Code provides that:

> When an arresting officer attempts to take a person arrested for a misdemeanor or infraction of this code before a magistrate and the magistrate or person authorized to act for him is not available, the arresting officer shall take the person arrested, without unnecessary delay, before:
> (a) The clerk of the magistrate who shall admit him to bail in accordance with a schedule fixed as provided in Section 1269b of the Penal Code, or
> (b) The officer in charge of the most accessible county or city jail or other place of detention within the county who shall admit him to bail in accordance with a schedule fixed as provided in Section 1269b of the Penal Code or may, in lieu of bail, release the person on his written promise to appear as provided in subdivisions (a) through (f) of Section 853.6 of the Penal Code.
>
> Whenever a person is taken into custody pursuant to subdivision (a) of Section 40302 and is arrested for a misdemeanor or infraction of this code pertaining to the operation of a motor vehicle, the officer in charge of the most accessible county or city jail or other place of

to sign the ticket but was instead demanding, in accordance with state law, that he be taken to a magistrate, Smith told him that he was being arrested for a violation of sections 40302(b) and (c) of the California Vehicle Code.[3]

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detention within the county may detain the person arrested for a reasonable period of time, not to exceed two hours, in order to verify his identity.

Contrary to Chaidez's and perhaps Smith's statements to Henry, the statute provides for persons taken into custody to be brought to a local jail, but it does not provide for them to be put in jail. For the significance of this distinction see infra Part IV.

[3]Section 40302 provides:

Whenever any person is arrested for any violation of this code, not declared to be a felony, the arrested person shall be taken without unnecessary delay before a magistrate within the county in which the offense charged is alleged to have been committed and who has jurisdiction of the offense and is nearest or most accessible with reference to the place where the arrest is made in any of the following cases:
(a) When the person arrested fails to present his driver's license or other satisfactory evidence of his identity for examination.
(b) When the person arrested refuses to give his written promise to appear in court.
(c) When the person arrested demands an immediate appearance before a magistrate.
(d) When the person arrested is charged with [driving under the influence of drugs or alcohol].

As Henry explained to Smith, § 40302 does not define any

At that point, Chaidez handcuffed Henry, placed him in the front seat of a patrol car, and drove him to the Shasta County Jail. Chaidez did not give Henry a Miranda warning, nor, it appears, did Henry receive one at any time while he was in custody. Upon arriving at the jail at 11:00 p.m., Chaidez told the booking officer that Henry was being jailed for refusing to sign a ticket. Henry renewed his demand to be taken to a magistrate without delay, to which the booking officer responded that Henry would not see a magistrate until the following day. Sergeant Bosenko and Deputy Doyle told Henry that he could either sign a promise to appear and be released on his own recognizance, or post bail, which was set at $76.00. When Henry renewed his request to be taken to a magistrate, he was booked on the charge of violating § 40302(b) of the California Vehicle Code. *See supra* note 3.

A deputy sheriff and a nurse then asked Henry some medical questions. The two would not tell Henry their names and he could not read their name tags because he did not have his glasses with him.[4] Henry stated that he had a heart problem for which he occasionally took nitroglycerin, but that

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conduct as criminal and could not be the basis for an "arrest." Instead, it provides for certain circumstances under which persons "arrested" for non-felony violations of other sections of the vehicle code are to be taken to a magistrate rather than being cited and released. *See infra* Part IV.

[4]The record shows that the nurse was Karen Bruce-Parrott, but does not reflect the name of the deputy.

he did not have his medication with him. He also stated that he was not suicidal, that he had never considered suicide, that he had not hit his head or suffered from dizzy spells recently, and that he did not need medical assistance. He refused to answer any other medical questions, however, instead telling his two interrogators that he needed to remain silent in order to protect his rights. He also told them that he would answer any questions asked of him once he was taken before a magistrate. The nurse informed him that his clothing would be removed and he would be placed in a padded medical "safety cell" (i.e., a "rubber room") if he did not answer her questions. Then, at 11:30 p.m., she ordered that he be taken to the hospital for an examination by a physician.

While Henry was at the hospital,[5] his wife had a telephone conversation with the nurse. According to the nurse, Mrs. Henry was belligerent and sounded intoxicated, stated that Henry had a heart condition and other medical problems, and, "[w]hen [the nurse] asked her if he was suicidal, she said that he could be," but she refused to say whether Henry had diabetes or any other serious medical condition or illness. Mrs. Henry's description of the conversation was rather different:

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[5]Chaidez handcuffed Henry and took him to the Redding Medical Center in a patrol car. When they arrived, Henry was not violent or unruly, but he did refuse to cooperate with the examining doctor and nurse and instead informed them that he was being held against his will.

> [The nurse] stated that [Henry] was fine. I asked her why I was talking to her. She stated it was standard procedure for all inmates to be placed under observation. I asked why my husband was being observed since he was fine when he was arrested. She repeated that it was just standard procedure for all inmates.
>
> At no time did she ask me if my husband was suicidal or did she ask me if my husband had ever been suicidal. She mentioned nothing about my husband being at risk of a stroke, heart attack, or highly agitated.

Henry was returned to the jail at approximately 1:00 a.m. He again refused to answer a nurse's medical questions. Although the nurse stated in her declaration that Henry "did not appear to be in any distress," she nonetheless ordered that he be placed in a medical "safety cell."[6] Accordingly, Henry was searched and then taken to the cell -- a padded room with no sink or other water supply and no heat. In lieu of a toilet,

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[6]Henry stated in his declaration that the nurse who gave that order was the same one who had questioned him earlier. Nurse Bruce-Parrott stated in her declaration that she went off duty before Henry's return, however, and Nurse Sharon Denny stated that she was the one who had Henry placed in the cell. Henry, as noted above, was not wearing his eyeglasses at the time.

there was an uncovered hole cut in the center of the cell floor. The only other object in the cell was a plastic mattress thrown on the floor. The cell floor was sticky and had a strong smell of "stale urine." According to Henry, the nurse told two or three deputies "that she wasn't going to fool with [him] and if [he] did not want to answer her questions that she would show [him], and then told the deputies to remove all of [his] clothes." The deputies complied with her orders. After further discussion with the deputies, the nurse ultimately consented to give Henry a blanket. A deputy threw the blanket onto the floor in the far corner of the room. Henry was placed on suicide watch, with "checks" every fifteen minutes,[7] and "remained in that room with [his] feet and body

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[7]It may be appropriate to state once again that, because this appeal involves a summary judgment order, we must take the facts as the plaintiff asserts them. We might also note, however, that Henry's version of the facts is reminiscent of the lyrics in one of this nation's most popular songs
of the Vietnam era:

> After the ordeal, we went back to the jail.
> [Officer] Obie said he was gonna put us in the cell.
> Said, "Kid, I'm gonna put ya' in the cell.
> I want your wallet and your belt."
> And I said, "Obie, I can understand you wanting my wallet
> so I don't have any money to spend in the cell,
> But what do you want my belt for?"
> And he said, "Kid, we don't want any hangings."
> Said, "Obie, didja' think I was gonna hang myself for
> litterin'?"
> Obie said he was makin' sure,

sticking to the urine splattered floor for about 2 and one-half hours."[8]

At that point, two deputies came to get Henry and "paraded [him] through the jail, naked, to the booking cage in full view of male and female deputies and inmates." Henry once again refused to answer any questions or to sign

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> And, friends, Obie was,
> Cause he took out the toilet seat so I couldn't hit myself over the head and drown.
> And he took out the toilet paper so I couldn't bend the bars, roll the toilet paper out the window, slide down the roll, and have an escape.
> Obie was makin' sure,
> And it was about four or five hours later that Alice,
> Remember Alice? It's a song about Alice.
> Alice came by, and with a few nasty words to Obie on the side, bailed us out of jail,
> And we went back to the church, had another
> Thanksgiving dinner that couldn't be beat,
> And didn't get up until the next mornin', when we all had to go to court.

Arlo Guthrie, *Alice's Restaurant Massacree*, on The Best of Arlo Guthrie (Warner Bros. Records 1977).

When Guthrie sang his historic song at a recent music festival, he observed, "A lot of time's gone by, but not a lot has changed." Tom Knapp, *Further Festival Charms Hershey*, Intelligencer J., July 12, 1997, available in 1997 WL 4302994.

[8]The prison health service record on Henry notes that he was placed in the "safety cell" to "[rule out] suicidal ideation & to observe."

anything until he was taken before a magistrate. He was photographed and then taken back to the "urine-coated" rubber room, where he was left until 9:10 a.m. At that point, a deputy came to the cell, and Henry asked him for a form habeas corpus petition, a pencil, and a magnifying glass (to enable him to see without his glasses so that he could fill out the form). The deputy just laughed and said, "Yeah right." When Henry stated that he had a right to the materials necessary for preparing a habeas petition, the deputy again laughed at him, announcing "that as long as [Henry] was in that cell that [he] had no rights." The deputy then left, but Henry overheard him telling other officers about the request for the habeas materials. The other officers also laughed loudly when they heard of the request.

Shortly, a different deputy arrived and asked Henry if he knew why he was being held in a padded cell. When Henry said "no," the deputy told him that the reason was because he had refused to fill out the forms and answer the questions presented to him. The deputy then told Henry that "if [Henry] did not sign [the deputy's] paper that [he] would remain in that cell, naked, indefinitely. [The deputy] also told [him] that there would be no appearance before a judge either." Fearing for his health and safety, Henry "agreed under threat" to comply. When he explained to the deputy that he could not see to read -- or even to sign -- the statement the deputy produced, the deputy placed Henry's hand at the signature line and had him sign the form anyway. Apparently, no one ever bothered to read the statement aloud

so that Henry would know what he was being compelled to sign.

After Henry signed the statement, the deputy told him that "if at anytime [he] refused to sign any and all papers or answer any and all questions to [the deputy's] satisfaction, [he] would find [himself] right back where [he] started, naked and in the urine-coated cell." Only after receiving that additional warning was Henry permitted to take a shower, get dressed, and move to a clean cell. Jail medical records show that Henry spent a total of 9 hours 53 minutes in the "safety cell." Later, Henry was put through the booking process once again, at which point a deputy "reminded [him] what would happen if [he] didn't cooperate fully." A different deputy then told Henry that "if [he] `pissed off' the judge and came back down to the jail for any other reason than to be released, that [he] would be stripped naked, receive a body cavity search and be placed back in the solitary confinement cell."

At 1:30 p.m. Henry was finally brought before a commissioner, who ordered him released on his own recognizance until his arraignment for the traffic infractions. Henry appeared at the arraignment and at trial, where, on his motion, the charges were dismissed.

On December 30, 1993, Henry filed the instant § 1983 action against the State of California, Shasta County, Jim Pope in his official capacity as sheriff of Shasta County, California Highway Patrol Officers Chaidez and Smith, and unnamed jail personnel. His complaint alleged violations of

his First, Fourth, Fifth, Eighth, and Fourteenth Amendment rights. The named defendants moved for summary judgment, which the district court granted, concluding that: (1) the State of California is not a person within the meaning of § 1983 and is immune under the Eleventh Amendment; (2) Officer Chaidez and Sergeant Smith were not liable under § 1983 because they arrested Henry and transported him to the Shasta County Jail pursuant to state law;[9] and (3) Shasta County and Sheriff Jim Pope were not subject to municipal liability under § 1983 because Henry failed to produce any evidence to support either a pattern and practice claim or a deliberate indifference claim. This appeal followed.[10]

II. State of California

[1]The Eleventh Amendment immunizes states from

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[9]The district court specifically held that the officers acted pursuant to Cal. Veh. Code SS 40302 and 40307, described *supra* notes 2-3 and accompanying text.

[10]Thus, the district court never addressed the questions whether Henry stated a claim or offered evidence that any constitutional violations actually occurred. Because Henry clearly stated a claim of a flagrant Fourth Amendment violation, and because we conclude that he presented sufficient evidence of the existence of a county policy to survive summary judgment, we need not consider his other allegations at this point, and instead leave it to the district court initially to decide whether he also stated claims under the First, Fifth, Eighth, and Fourteenth Amendments.

private damage actions brought in federal court. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984); *Mitchell v. Los Angeles Community College Dist.*, 861 F.2d 198, 201 (9th Cir. 1988). Therefore, the grant of summary judgment in favor of the State of California was proper.

III. Shasta County and Sheriff Pope

[2] A municipal defendant may only be held liable under § 1983 if the unlawful actions of its employees or agents were taken pursuant to that defendant's policies or customs, *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 694 (1978), including a policy of being deliberately indifferent to the rights of its inhabitants, *City of Canton v. Harris*, 489 U.S. 378, 389 (1989). Henry claims that in removing his clothes; placing him in an unheated, urine-coated "safety cell" for a lengthy period of time; repeatedly threatening to leave him in that condition unless he complied with their demands; and ignoring his plea for the materials he needed to prepare a habeas petition, the staff of the Shasta County Jail acted pursuant to a county policy of abusing persons arrested for minor vehicle code infractions who refuse to sign notices to appear, or demand to be taken to a magistrate. Alternatively, he urges that the county has a policy of being deliberately indifferent to such conduct by its employees. In granting summary judgment in favor of Shasta County and its policymaker Sheriff Pope (collectively,

"the county"), the district court held that there was no evidence that the abuse Henry suffered was inflicted pursuant to a county policy or custom, or that it resulted from deliberate indifference on the part of the county. Upon reviewing the complete record, and viewing the evidence in the light most favorable to Henry, we conclude, to the contrary, that Henry did offer sufficient evidence to give rise to genuine issues of material fact as to whether the county had a policy or custom of flagrantly violating the constitutional rights of persons stopped for minor vehicle code infractions who refuse to sign a notice to appear or demand to be taken before a magistrate, or whether it was deliberately indifferent to such practices by its employees. We therefore reverse the grant of summary judgment as to the county.

[3]Several pieces of evidence in the record go to the question of municipal liability: the declarations of Michael May and Robert Burns, facts recited in Henry's declaration, and a portion of Henry's jail medical record.[11] May and

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[11]The record also contains the declarations of Deborah Peeples, Terry Peeples, and Daniel Tankersley, all of whom state that they belong to a seventy-five member group that meets regularly to "discuss and exchange information on law subjects," including strategies for asserting their rights when stopped for vehicle code infractions. They further state that members of their group stopped for such infractions are often taken to jail or threatened with "nasty treatment" in order to coerce them to sign notices to appear. It is not clear from the record whether May, Burns, and Henry are members of the group, though we suspect that they are. We need not consider at this stage whether these declarations are admissible because May's, Burns', and Henry's

Burns each described being subjected to treatment at the Shasta County Jail virtually identical to Henry's after they were stopped for what were at worst only minor traffic infractions. Henry related that a number of different deputies and nurses, some acting in concert and some independently of one another, all participated in the flagrant violation of his constitutional rights. Jail personnel noted in Henry's medical record that he received the same treatment at the jail in 1986, apparently following his arrest for a similarly minor infraction. Viewing the evidence in the light most favorable to Henry, the declarations of May and Burns, Henry's statements about the threats and actions of a large number of officials at different times over the course of a night and the following day, and the medical record are sufficient to raise genuine issues of material fact as to the municipal liability claim. We consider each of those pieces of evidence in turn.

[4]Burns in his declaration states that, like Henry, he was arrested in conjunction with a traffic stop for a non-working tail light. The arrest occurred in February or March of 1994, two to three months after Henry filed the instant § 1983 action. The arresting officer took Burns to the Shasta County Jail, where, in response to his repeated requests to see an attorney, he was held naked in a "rubber room " until 1:00 p.m. the following day, when, while on the way to see a magistrate, he was informed that his case had

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declarations suffice to give rise to a genuine issue of material fact as to the *Monell* question.

been dismissed, and he was released. It is a reasonable inference -- indeed, the only reasonable inference -- that after Henry filed suit and successfully served process against the county, it knew about the alleged malfeasance of its employees at the jail. As we will explain more fully below, such "post-event evidence" may be used to prove the existence of a municipal policy in effect at the time that Henry was detained. *See, e.g., Larez v. City of Los Angeles,* 946 F.2d 630, 645 (9th Cir. 1991) (where allegation was that police chief set tone condoning and encouraging excessive use of force, "we can hardly think of better evidence" than statements he made after incident that were consistent with those claims); *McRorie v. Shimoda*, 795 F.2d 780, 784 (9th Cir. 1986) ("Policy or custom may be inferred if, after [constitutional violations], . . . officials took no steps to reprimand or discharge the [prison] guards, or if they otherwise failed to admit the guards' conduct was in error.") (citation omitted). Here, factual issues were presented that the county acted in accordance with an established policy or deliberate indifference to violation of rights by stripping and detaining in rubber rooms persons stopped for minor, non-jailable traffic offenses who refuse to sign a notice to appear, or demand to be taken before a magistrate. There was evidence that the county permitted an almost identical incident as that complained of by Henry to occur after the county was sued and after being put on notice unequivocally of its deputies' and nurses' unconstitutional treatment of Henry.

May's declaration provides further evidence of such a policy. A police officer approached May as he was sitting in a parked car, eating a hamburger. When May refused to cooperate with the officer's demands, he was arrested and taken to the jail. Because he continued to refuse to cooperate, and instead demanded to be taken to a magistrate, the jail staff placed him in a "rubber room." Six officials working together held him on his hands and knees, handcuffed, with"[his] neck forced down on a mattress on the floor," while they removed his clothing. They then left him on the bare mattress, where he lay without a blanket, naked and shivering, all night. Despite his repeated requests to make a phone call, he was held incommunicado in that condition until approximately noon the next day, in violation of both California law and his First and Fifth Amendment rights. *See* Cal. Penal Code § 851.5 (providing that arrestees are entitled to make three completed telephone calls immediately upon being booked); *Carlo v. City of Chino*, 105 F.3d 493, 500 (9th Cir. 1997) (holding that Cal. Penal Code § 851.5 gives rise to federal procedural due process interest); *Keenan v. Hall*, 83 F.3d 1083, 1092 (9th Cir. 1996) (acknowledging First Amendment right of prisoners to telephone access subject to reasonable security limitations); *Strandberg v. City of Helena*, 791 F.2d 744, 747 (9th Cir. 1986) (same). May's detention occurred only two and one-half months after Henry's. Such close proximity in time of the two events lends further supports to Henry's claim that his treatment was not an isolated event but was instead

inflicted in accordance with county policy.

In holding that the May and Burns declarations may be used to establish municipal liability although the events related therein occurred after the series of incidents that serves as the basis for Henry's claims, we reiterate our rule that post-event evidence is not only admissible for purposes of proving the existence of a municipal defendant's policy or custom, but is highly probative with respect to that inquiry. *See, e.g., Larez*, 946 F.2d at 645. The leading case on the use of post-event evidence in § 1983 municipal liability cases, which we cited with approval in *Larez* and *McRorie*, is *Grandstaff v. City of Borger*, 767 F.2d 161 (5th Cir. 1985). In *Grandstaff*, the Fifth Circuit affirmed a jury verdict holding the City of Borger, Texas, liable when members of its police force mistook an innocent person for a fugitive and killed him. At the outset, the *Grandstaff* court noted that isolated instances of official misconduct are insufficient to establish municipal liability under *Monell*. 767 F.2d at 171. *See, e.g., Tuttle v. Oklahoma City*, 471 U.S. 808 (1985). It also recognized that the existence of the city policy at issue -- that of deliberate indifference to the "dangerous recklessness" of its police department -- must be inferred circumstantially from the conduct of individual officers and the police chief, and then explained that the plaintiffs had failed to point to even a single prior incident of police misconduct to serve as evidence of the existence of such a policy. *Id.* at 171. All that the plaintiffs had proven, the court stated, was that the conduct of the six officers comprising one shift of the Borger

police force acted during a single night in ways that displayed a disregard for human life and safety. *Id.* Nevertheless, the court upheld the jury verdict against the city, concluding that the police chief's failure to respond to the situation or to make changes in order to prevent recurring violations evidenced the city's preexisting policy of deliberate indifference to the dangerous recklessness of its police officers.[12] *Id.*

Specifically, the Grandstaff court explained that in the aftermath of the shooting,

> there were no reprimands, no discharges, and no admissions of error. The officers testified at the trial that no changes had been made in their policies. If that episode of such dangerous recklessness obtained so little

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[12]Several circuits in addition to ours have adopted the *Grandstaff* approach. In *Bordanaro v. McLeod*, 871 F.2d 1151 (1st Cir. 1989), for example, First Circuit noted at the outset that"[t]he [Supreme] Court has never held that inferences about what customs or policies existed in a city before an event could not be drawn from subsequent actions." *Id.* at 1166-67. Quoting *Grandstaff* at length, it went on to conclude that such inferences were proper. *Id.* at 1167. *See also Black v. Stephens*, 662 F.2d 181, 190-91 (3d Cir. 1981) (police chief's failure to institute adequate investigatory procedures for determining when police officers should be disciplined constituted official policy encouraging excessive use of force); *Jones v. City of Chicago*, 787 F.2d 200, 207 (7th Cir. 1986) (had prior complaint in companion case not been thoroughly investigated by city, reasonable inference could be drawn regarding city's deliberate indifference to safety and well-being of patients at public health clinic).

attention and action by the City policymaker, the jury was entitled to conclude that it was accepted as the way things are done and have been done in the City of Borger. If prior policy had been violated, we would expect to see a different reaction. If what the officers did and failed to do . . . was not acceptable to the police chief, changes would have been made.

This reaction to so gross an abuse of the use of deadly weapons says more about the existing disposition of the City's policymaker than would a dozen incidents where individual officers employed excessive force. The policymaker's disposition, his policy on the use of deadly force, after [the date of the shooting] was evidence of his disposition prior to [that date]. As subsequent conduct may prove discriminatory motive in a prior employment decision, and subsequent acts may prove the nature of a prior conspiracy, so the subsequent acceptance of dangerous recklessness by the policymaker tends to prove his preexisting disposition and policy.

767 F.2d at 171 (citations omitted).

[5] If a municipal defendant's failure to fire or reprimand officers evidences a policy of deliberate indifference to their misconduct, surely its failure even after being sued to correct a blatantly unconstitutional course of treatment -- stripping persons who have committed minor traffic infractions, throwing them naked into a "rubber room" and holding them there for ten hours or more for failing to sign a traffic ticket or asserting their legal right to be brought before a magistrate -- is even more persuasive evidence of deliberate indifference or of a policy encouraging such official misconduct.[13] May's and Burns' declarations are sufficient to show for purposes of summary judgment that such abuse of people who commit minor infractions is "the way things are done and have been done" in Shasta County, and thus would allow a jury to make a finding as to the existence of a policy or custom.

Those declarations are by no means the only evidence Henry has offered to support his *Monell* claim, however. Henry's declaration includes the following facts, among others: (1) a sheriff's deputy not only refused to provide him with the materials he requested in order to prepare a habeas petition -- materials to which he had a right under clearly

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[13]We note also that, although there is no record at this stage of the proceedings as to whether disciplinary proceedings were ever held, it does appear from the declarations submitted by the defendants that at least some and perhaps all of the individuals responsible for violating Henry's rights are still employed in their former capacities at the Shasta County Jail.

established federal law, *see, e.g., Bounds v. Smith*, 430 U.S. 817, 824-25 (1977) ("It is indisputable that indigent inmates must be provided at state expense with paper and pen to draft legal documents with notarial services to authenticate them, and with stamps to mail them."); *Straub v. Monge*, 815 F.2d 1467, 1467-68 (11th Cir.) (holding that Bounds rights apply to pretrial detainees in county jail), *cert. denied*, 484 U.S. 946 (1987); *Leeds v. Watson*, 630 F.2d 674 (9th Cir. 1980) (applying Bounds with equal force to persons in county jail) -- but also repeated the request to various other jail personnel, who merely laughed and did not take any steps to comply with the request; (2) even after Henry ultimately told a second deputy that he would cooperate, and signed the statement placed before him (which he made clear he could not see to read and which was not read to him), that deputy twice threatened that if he did not continue to cooperate he would be put back in the "safety cell"; and (3) a third deputy later warned Henry "that if [he] `pissed off' the judge and came back down to the jail for any other reason than to be released, that [he] would be stripped naked, receive a body cavity search[14] and be placed back in the solitary confinement cell."

[6] The continuing threats Henry received from various sheriff's deputies, both before and after he complied with their demands, provide substantial evidence that the jail personnel were acting in accordance with a county policy

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[14]A body cavity search of Henry under those circumstances not only would have been unconstitutional, but also would have violated subsections (f) and (h) of Cal. Penal Code § 4030.

encouraging or at least condoning flagrantly unconstitutional treatment of persons stopped for non-jailable offenses who refuse to sign notices to appear or demand to be taken before a magistrate. In short, the evidence of the officials' conduct strongly suggests that Henry's treatment resulted from a wide-spread pattern of abuse by numerous individuals rather than a single instance of mistreatment by a solitary officer. The staff of the Shasta County Jail deals with detainees -- including ones who refuse to answer questions and instead assert their rights under federal and state law -- on a daily basis. Indeed, dealing with detainees is a, if not the, core function the county entrusts them with performing. In view of all the facts and circumstances of Henry's confinement, there is adequate evidence to suggest that the violations of his constitutional rights were not the result of a few officers acting on a lark or in violation of the orders or policies that governed their conduct. The fact that so many officials participated in the manner they did in the unconstitutional abuse of Henry throughout the period of his detention is thus further substantial evidence in support of his *Monell* claim. *See, e.g., Kibbe v. City of Springfield*, 777 F.2d 801 (1st Cir. 1985) (conduct of ten officers, three of whom fired shots, during attempted apprehension of suspect was sufficient to support verdict against city on *Monell* claim).

[7]Finally, there is evidence in the record that Henry himself was placed in a rubber room at the jail in 1986 under substantially similar circumstances. The Prison Health Services record on Henry's detention in the "safety cell " in

1993 includes the following notations:

> [Henry] was placed in [a medical "safety cell"] to [rule out] suicidal ideation & to observe. He appeared to sleep all night. Refused breakfast. Inmate did this in 1986 also. He was arrested because he refused to sign a "fix-it" ticket for a taillight as it "violates my constitutional rights." He was brought to jail. 1986 he did the same thing. Refused to answer med. questions.

Thus, there is evidence that a county policy of abusing persons stopped for minor infractions who refuse to sign a ticket or demand to see a magistrate by throwing them naked into a "safety cell" had been in existence since at least 1986. It suggests further that the Shasta County officials in charge of the jail consistently act on the premise that persons who insist on the full measure of legal rights in motor vehicle infraction cases are mentally unbalanced.

In sum, we conclude that, individually and collectively, the May, Burns, and Henry declarations along with the official records, are sufficient to raise genuine issues of material fact as to the *Monell* claim. That Henry himself encountered similar treatment some seven years before not only adds weight to his claims but also evidences that the policy was a long-standing one. Therefore, we reverse and remand the district court's grant of summary judgment with

respect to the county.

IV. Officer Chaidez and Sergeant Smith

Sergeant Smith (accompanied by Officer Chaidez) (collectively "the officers") informed Henry that he was being arrested for a violation of California Vehicle Code §§ 40302(b)-(c) and for tail light and seat belt violations, both of which are non-jailable offenses for which violators are to be cited and released under California law. *See generally* Cal. Veh. Code §§ 24252(a), 27315(d). They also told him that he would be taken to jail. Henry claims that his arrest, transportation, and detention for these infractions violated his Fourth Amendment rights. In other words, as the district court observed, Henry brings an as-applied, constitutional challenge to the officer's conduct under the California statutes. The district court granted summary judgment in favor of the officers on the basis that "Henry was taken into custody and transported to the Shasta County Jail pursuant to state law."

[8] The district court was correct that the officer's conduct in arresting, detaining (until they reached the jail), and transporting Henry to jail was objectively valid under

California law.[15] Under California law,"a Vehicle Code violator is technically under arrest when an officer has probable cause to believe that person has committed a Vehicle Code offense, and begins the process of issuing a citation to appear in court." *People v. Monroe*, 12 Cal. App. 4th 1174, 1183 n.5, 16 Cal. Rptr. 2d 267, 274 n.5 (Cal. Ct. App. 1993).[16] Furthermore, Henry has failed to offer any evidence refuting the officers' assertion that a magistrate was not available. Once Henry demanded to see a magistrate in lieu of signing the notice to appear, therefore, the officers could, under California law, take him to the county jail. That was a proper course of action under section 40307, which provides

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[15]Even though the officers also told Henry that they intended to put him "in" jail, they did not actually do that; nor was Henry put in jail without intervening "cause." Immediately after Henry's arrival at the jail, the booking agent told Henry that he could either sign a promise to appear and be released on his own recognizance or post bail. It was only after Henry refused to do so and instead renewed his request to see a magistrate that Sergeant Bosenko and Deputy Doyle decided to book him and put him in jail.

[16]Section 40302, however, is "a procedure for arrest of a Vehicle Code violator; it does not prohibit conduct, nor is it the basis for arrest." *People v. Monroe*, 12 Cal. App. 4th 1174, 1192-93, 16 Cal. Rptr. 2d 267, 280 (Cal. Ct. App. 1993); *see also People v. Superior Court of Los Angeles County*, 7 Cal. 3d 186, 200-201, 496 P.2d 1205, 1216 (Cal. 1972) (§ 40302 "is not penal in nature and cannot form a basis for a lawful arrest"), *abrog. on other grounds, People v. Castenada*, 35 Cal. App. 4th 1222, 1228-29, 42 Cal. Rptr. 2d 18, 22 (Cal. Ct. App. 1995).

that"[w]hen an arresting officer attempts to take a person arrested for a misdemeanor or infraction of [the vehicle code] before a magistrate and the magistrate or person authorized to act for him is not available," the arresting officer must take the arrestee "without unnecessary delay" before the magistrate's clerk, who is to admit him to bail, or before the officer in charge of the local jail, who may either admit him to bail or release him on a written promise to appear. Cal. Veh. Code § 40307.

[9] The district court, however, did not address the fundamental question whether the officers' conduct, while consistent with the California statutes, was constitutional. Thus, its analysis was incomplete. Henry, as a "person invoking [an as-applied challenge,] asserts that the acts . . . that are the subject of the litigation fall outside what a properly drawn prohibition could cover." *Board of Trustees, State Univ. of N.Y. v. Fox*, 492 U.S. 469, 482 (1989). On this appeal, the issue is not whether the officers' conduct was in accord with state law, but whether their conduct "[fell] outside what a properly drawn [statute] could cover." *Id.* The question of the constitutionality of the provisions of §§ 40302 and 40307 as applied to facts like these is a matter that we have not yet decided.[17] Because the answer depends on

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[17]We note that in *United States v. Mota*, 982 F.2d 1384 (9th Cir. 1993), in which we held that officers violate a suspect's Fourth Amendment rights when they take him into custodial arrest without state-law authority, we expressed no view on the constitutionality of custodial arrests for traffic infractions pursuant

questions of fact and law, *see, e.g., Berkermer v. McCarty*, 468 U.S. 420, 439 (1984), that the district court did not address, we prefer not to decide it initially on appeal. We prefer to leave initial decisions of questions of this type to the district court. We remand these claims to the district court for further consideration. *United States v. One 1978 Piper Cherokee Aircraft*, 91 F.3d 1204, 1210 (9th Cir. 1996); *Dodd v. Hood River County*, 59 F.3d 852, 864 (9th Cir. 1995).

V. Conclusion

For the foregoing reasons, we affirm the district court's grant of summary judgment with respect to the State of California, but reverse and remand with respect to the County of Shasta, its policymaker Sheriff Pope, and Officers Chaidez and Smith.[18]

AFFIRMED IN PART, REVERSED AND REMANDED IN PART. Costs are awarded to Plaintiff-Appellant.

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to any state law. We cited Cal. Penal Code § 853.5, which permits officers to take into custody individuals arrested for infractions who refuse to sign written notices to appear, only to establish that the officers in that case did not act in accordance with state law. *See id.* at 1388-89. The constitutionality of Penal Code § 853.5 was in no respect before us.

[18]Because summary judgment was not granted with respect to the Doe defendants, they, too, remain parties to this case, subject to the rules applicable to unnamed "doe" defendants.

RYMER, Circuit Judge, dissenting:

The issue in this case is not whether Henry's treatment at the Shasta County Jail was awful: it was awful. The issue is whether the County and Sheriff Pope (or the arresting officers) had anything to do with it. There is no evidence they did. For this reason I part company with the majority opinion.

I

Liberally construed, Henry contends that the County and Sheriff Pope were responsible for his continuing illegal arrest and incarceration once they accepted him into their custody.[1] It is well settled that the County and the Sheriff in his official capacity can be held liable under § 1983 only if they deprived Henry of a constitutional right as a result of an official policy or custom. *Monell v. Department of Soc. Servs. of New York*, 436 U.S. 658 (1978).

As I piece it together, Henry posits four unconstitutional policies: a policy not to have magistrates

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[1]Actually, Henry's opening brief makes no argument at all about the liability of Shasta and Sheriff Pope. The issue should, therefore, be deemed abandoned. *See, e.g., Officers for Justice v. Civil Serv. Comm'n*, 979 F.2d 721, 726 (9th Cir. 1992). In his reply brief, Henry does argue that the county and the Sheriff have a policy of delaying the taking of arrestees to the magistrate for 14 hours when the charge is an infraction.

available at night; a policy to delay magistrate appearances overnight; a policy not to assist an arrestee in contacting a magistrate; and a policy to delay magistrate appearances, and to retaliate against detainees who demand to see a magistrate, by incarcerating them in the safety cell and coercing their compliance with booking procedures. While there is some evidence of a policy that magistrates are not available until the next business day following an arrest at night, it was not constitutionally unreasonable for Henry to be detained overnight. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991). Beyond this, there is no evidence that the County or Pope had adopted a formal policy of delaying appearances or retaliating in any way against those who asked to see a magistrate, and there is no evidence affirmatively linking Henry's treatment by individual jailers to an official County policy or custom, whether effected by "lawmakers or by those whose edicts or acts may fairly be said to represent official policy." *Monell*, 436 U.S. at 694; *see also City of Canton v. Harris*, 489 U.S. 378 385 (1989) ("[O]ur first inquiry in any case alleging municipal lia- bility under § 1983 is the question whether there is a direct causal link between a municipal policy or custom and the alleged constitutional violation.").

Absent a formal government policy, Henry must show a "longstanding practice or custom which constitutes the standard operating procedure of the local government entity," *Gillette v. Delmore*, 979 F.2d 1342, 1346 (9th Cir. 1992) (internal quotations omitted). Henry's only submission con-

sists of declarations from two other persons who were arrested after he was, on July 28, 1993 and in February or March, 1994, and were also kept in a jail safety cell when they refused to comply with booking procedures and demanded to see a magistrate in connection with traffic-related infractions. However, there is no evidence that Shasta County or Pope knew about Henry's treatment at the jail such that it could reasonably be inferred from the later incidents that they had somehow ratified what happened to Henry, or that there was "a widespread practice" that was "so permanent and well settled as to constitute a `custom or usage' with the force of law," *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-68 (1970)), that caused Henry to be treated as he was. Pope's declaration to the contrary is uncontradicted.

"Liability for improper custom may not be predicated on isolated or sporadic incidents; it must be founded upon practices of sufficient duration, frequency and consistency that the conduct has become a traditional method of carrying out policy." *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996) (noting that two incidents are not sufficient to establish custom, *Meehan v. County of Los Angeles*, 856 F.2d 102 (9th Cir. 1988)), *cert. denied*, 117 S. Ct. 1249 (1997). Nor may a supervising policymaker (which I am willing to assume for this purpose that Pope was, although Henry provides no facts

and cites no law indicating that this is so[2]) be held liable without participating in a particular decision or ratifying it, unless "a series of decisions by a subordinate official manifested a `custom or usage' of which the supervisor must have been aware." *Praprotnik*, 485 U.S. at 130. Nothing of the sort has been shown here. Therefore, even if individual jailers in these three instances did place the detainees in a safety cell for retaliatory and coercive purposes, violating their First, Fourth, and Fourteenth Amendment rights, neither Shasta County nor Pope can be liable under § 1983. Otherwise, Shasta County would be liable "solely because it employs a tortfeasor--or, in other words . . . on a respondeat superior theory." *Monell*, 436 U.S. at 691 (emphasis original).

None of the cases upon which the majority relies to support its theory of post-event liability has anything to do with this case, where there is no evidence that the policymaker (assuming that's what Pope is) or the County knew about the Henry incident, had any custom or policy sanctioning, encouraging or permitting the objectionable treatment about which he complains, or expressed any opinion about it that would raise a triable issue of fact about

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[2]*See Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1368 (9th Cir. 1994) (rejecting § 1983 claim where plaintiff cited no facts nor law showing that a police commander is an authorized decisionmaker for the City and County), *cert. denied*, 513 U.S. 1083 (1995).

what official policy was.[3]

In *Larez v. City of Los Angeles*, 946 F.2d 630, 645 (9th Cir. 1991), Gates expressed an opinion after the incident (but during the trial) that showed what he thought about the use of force by law enforcement officials; there is no evidence about Pope that is remotely comparable. *McRorie v. Shimoda*, 795 F.2d 780, 784 (9th Cir. 1986), came up on dismissal of a pro se complaint -- not summary judgment, as here -- and the plaintiff had alleged that his injury was inflicted under orders. Here, Henry failed to come up with any evidence that tended to show that what happened to him at the jail was ordered by Pope or the County. In *Grandstaff v. City of Borger*, 767 F.2d 161 (5th Cir. 1985), there was no dispute that the Chief of Police knew about the incident; indeed, he'd been advised the minute trouble began. There is no similar evidence that

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[3]Indeed, Pope's declaration makes it clear that official policy was to comply with the mandates of the Supreme Court in *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). Pope also affirms that he knew of no custom, practice or procedure whereby persons arrested for infractions are denied their right to be taken before the Magistrate at the earliest opportunity; that it is official policy to comply fully with California law regulating when strip searches of arrestees are permitted, and that he knows of no custom, practice or procedure (or of any instance) whereby jail personnel conduct a strip search of a detainee arrested for an infraction; that there is no custom, practice or procedure whereby an arrestee is denied his right to make calls or isn't offered the opportunity to do so; and that he does not sanction or permit arrestees to be threatened, abused or in any way endangered by jail personnel. These statements are uncontradicted.

Pope (or anyone else outside the jail) knew about the incident (or any past incident of a similar nature), and failed to respond. The question in *Bordanaro v. McLeod*, 871 F.2d 1151 (1st Cir. 1989), was whether the admission of post-event evidence was an abuse of discretion; unlike the record in this case, there was evidence that the Chief had a report review process in place and must therefore have known about the incident. Also different from *Black v. Stephens*, 662 F.2d 181 (3d Cir. 1981), there's no issue in this case about instituting adequate investigatory procedures. And in *Jones v. City of Chicago*, 787 F.2d 200 (7th Cir. 1986), the City obviously knew about the prior complaint as it had investigated it whereas there is no evidence at all that Pope or Shasta knew about the Henry complaint. That makes all the difference in my view, for in the absence of any evidence that Pope or Shasta knew (or should have known because of procedures in place) about Henry's experience at the jail, either before it happened (because it was a practice they knew about) or while it was happening (because someone told them) or after it happened (because they knew about the complaint but did nothing to change things at the jail), it is not reasonable to infer backwards from the fact that a similar incident allegedly happened months later that either Pope or Shasta had a custom or policy that caused, or condoned, or was connected in any way with, Henry's injury.

I have no quarrel with the proposition that some post-event evidence may be admissible on the custom and policy of a police department to show ratification or

condemnation of the acts of others, but post-event evidence has no probative value on the prior existence of a custom or policy that caused constitutional injury to Henry in the absence of some other evidence showing that the policymaker was somehow aware of the incident yet did nothing to end it -- or said something to embrace it. It is only the fact of inaction (or affirmation) in the face of knowledge that gives rise to an inference that the policy that was left in place was in place all along.

Here, there is absolutely nothing to show that Pope or Shasta knew about the incident, or Henry's suit, before the Burns incident in February or March of 1994.[4] I would, therefore, affirm judgment for Pope and Shasta County.

II

I agree with the majority that the officers' conduct was

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[4]Pope *may* have known about the suit, but there's no evidence that he did know about it before the Burns incident. Henry was arrested May 19, 1993; the May incident occurred July 28, 1993 (and there's no evidence Pope knew about it, either); Henry's complaint in this action was filed December 30, 1993; Shasta and Pope filed an answer March 3, 1994; and the Burns incident was "February or March of 1994." Nor is there evidence to show what response, if any, Pope made to Henry's complaint after it was served, or even that there was time to do anything to avert a similar (Burns) incident from happening between the time of service and following investigation. Far from leading to a reasonable inference of ratification, it is patently unreasonable to conjure a triable issue of fact on this record.

objectively valid under California law, and that the district court incorrectly stopped its analysis once it concluded that Henry was taken into custody and transported to the Shasta County Jail pursuant to state law. Henry's challenge to the constitutionality of the statutes as applied requires the court to consider whether, in addition to the propriety of their conduct under state law, Chaidez and Smith violated his federal constitutional rights. However, I disagree that we need to remand on this account.

Chaidez and Smith did not violate any constitutional right with respect to the arrest and decision to take Henry into custody, because he undisputably did commit infractions, asked to be taken to a magistrate, and did not otherwise promise to appear. This leaves the question whether Henry's request to be taken before a magistrate and his refusal to sign the Notice to Appear justified the extent of detention based solely on Chaidez's assessment of probable cause. (As there is no evidence that the CHP officers had anything to do with Henry's treatment at the jail, except driving him to and from the hospital, or that they had any knowledge about how he would be handled, or responsibility for the decisions made at the jail by employees of the Shasta County Sheriff's Department, their liability in this case cannot depend on the constitutionality of the nature of Henry's detention.) Under the Supreme Court's opinion in *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), and ours in *Hallstrom v. City of Garden City*, 991 F.2d 1473 (9th Cir. 1993), detention at a jail facility from 9:55 p.m. until a magistrate was

available at 1:30 p.m. the following day was not unreasonable.

Arresting officers have a constitutional duty to ensure that arrestees are taken before a judicial officer "promptly after arrest." *Gerstein v. Pugh*, 420 U.S. 103, 125 (1975). *McLaughlin*, in turn, indicates that a judicial determination of probable cause within forty-eight hours of arrest will generally comply with *Gerstein*. *McLaughlin*, 500 U.S. at 56; *Hallstrom*, 991 F.2d at 1480. When a hearing does take place within a forty-eight hour period (as it did in Henry's case), the person arrested has the burden of proving that his probable cause determination was delayed unreasonably. As the Court explained in McLaughlin:

> Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake. In evaluating whether the delay in a particular case is unreasonable, however, courts must allow a substantial degree of flexibility. Courts cannot ignore the often unavoidable delays in transporting arrested persons from one facility to another, handling late-night bookings where no magistrate is readily available, obtaining the presence of an arresting officer who may be busy processing other suspects or securing the

> premises of an arrest, and other practical realities.

500 U.S. at 56-57. Henry adduced no evidence of unreasonable delay by Chaidez and Smith apart from the fact that he was not taken to a judicial officer until 1:30 in the afternoon following his 9:55 p.m. arrest. However, this is not prolonged detention beyond the mandate of *McLaughlin*, and is not unreasonable given the late-night arrest. Henry had his chance to overcome summary judgment on the point, but didn't. Therefore, I would affirm as to Chaidez and Smith.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF CALAFORNIA

ORDER
FILED, AUGUST 11, 1995
PAGE 43

JUDGMENT
FILED, AUGUST 11, 1995
PAGE 58

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ROLAND RICHARD HENRY, Plaintiff,	)
	) CIV NO. S-93-2038 GEB PAN
v.	)
	) ORDER
THE COUNTY OF SHASTA; JIM POPE; THE STATE OF CALIFORNIA; A.C. CHAIDEZ; H. SMITH and Does 1-50, Defendants.	)

Before the Court are Defendants County of Shasta and Jim Pope's motion for summary judgment and the State of California, A.C. Chaidez and H. Smith's motion for summary judgment.[1] Henry opposes the motions with a request for a

[1]Subsequent to oral arguments on the motions, Plaintiff submitted a video tape in opposition to Defendants' motions. Defendants request that the video tape be struck from evidence on various grounds and that Plaintiff be sanctioned for filing the tape. For the reasons given in Defendants' briefs filed April 14, 1995, and May 8, 1995, the video tape will not be considered in ruling on the motions for summary judgment. Additionally, for the reasons stated on page one of Plaintiff's brief filed May 3, 1995, no monetary sanction will be imposed.

continuance pursuant to Fed. R. Civ. P. 56(e) or, alternatively, based on the declaration of Henry and the documents he filed entitled "Statement of Genuine Issues in Support of Motion for Continuance and In Opposition" to the motions. For the reasons discussed below, Defendants' motions for Summary judgment are granted.

I. Factual History

On May 13, 1993, Henry was stopped by California Highway Patrol officer A.C. Chaidez at 9:55 P.M. for operating a motor vehicle with defective taillights in violation of Cal. Veh. Code § 24252. Plaintiff's, Separate Statement of Fact #1. Officer Chaidez wrote Henry a citation for violation of Cal. Veh. Code §§ 24252 and 27315 (failure to wear a seatbelt). Plaintiff's Separate Statement of Fact #2. When presented with the citation for placement of his signature in the promise to appear section, Henry did not sign it, but demanded to be brought before a Magistrate. Plaintiff's Separate Statement of Fact #3; Henry Depo. P. 32:9-13.

Officer Chaidez and Sgt. H. Smith then transported Henry to the Shasta County Jail. Henry Decl. ¶ 35; Defendants County and Pope's Points and Authorities in Support of Motion for Summary Judgment, Ex. B, Answer to Interrogatory No. 1. During the booking process, Henry was asked numerous medical questions. Henry Decl. ¶ 41. He responded that he had a heart problem and that he took "Nitro" although he did_ not have any with him. Henry Decl.

¶ 41. When questioned further about his health by nurses, Henry refused to answer additional questions. Henry Decl. ¶ 45. However, in response to a question whether he was suicidal, he responded "no." Henry Decl. ¶ 50. After several other questions, the nurse requested that Henry be taken to the Redding Medical Center for a checkup. Henry Decl. ¶ 55. Henry refused to be examined at the Medical Center, therefore he was returned to the Shasta County Jail. Henry Decl. ¶¶ 62-66. Upon his return, he was ordered to remove his clothes, following which he was placed in the "safety cell." Henry Decl. ¶¶ 67-72.

The next morning, Henry ultimately agreed to comply with booking procedures. Henry Decl. ¶¶ 103-109. He was then brought before commissioner Beth Livesay at approximately 1:00 p.m. Henry Decl. ¶ 112. He was released on his own recognizance that afternoon. Henry Decl. ¶ 115.

II. Procedural History

The County of Shasta and Jim Pope [County Defendants] filed a motion for summary judgment on January 3, 1995, which was calendared for hearing on February 6, 1995. However, Henry did not file an opposition. Instead, on February 2, 1995, Henry filed a Rule 56(f) motion and on February 3, 1995, Henry filed two declarations in support of the Rule 56(f) motion. In an Order dated February 6, 1995, the Court moved the hearing date to March 20, 1995, as a result of file an opposition. In addition, Henry was sanctions

should not be imposed for his opposition to the motion and was ordered to Henry's failure to timely ordered to show cause why failure to timely file an file an opposition to the pending motion no later than March 6, 1995. Henry timely responded to the OSC and requested a hearing on the imposition of sanctions.

Subsequent to the issuance of that Order, the State of California and officers Chaidez and Smith filed a separate motion for summary judgment on February 17, 1995, which was also calendared for hearing on March 20, 1995. Thus, pursuant to Local Rule 230(c), Henry's oppositions to both motions were due on March 6, 1995. On March 6, 1995, Henry filed an "Ex Parte Application for continuance" as well as points and authorities and a declaration in support of that request. On March 15, 1995, Henry filed opposition to the motions for summary judgment and additional points and authorities in support of his Rule 56(f) motion.

III. Analysis

A. Sanctions for Failure to Timely File-an Opposition to the County Defendants' Motion for Summary Judgment Originally Scheduled for Hearing On February 6, 1995 and the State Defendants' Motion Scheduled ,for March 20, 1995

Henry argues that sanctions should not be imposed for his failure to timely file an opposition to the County Defendants, motion for summary judgment, originally scheduled for hearing on February 6, 1995, because he was

relying on Fed. R. Civ. P. 56(c). Henry's response to the Order to Show Cause clearly shows that he wilfully ignored the rules of this court which require opposition to be filed no later than fourteen days before the hearing, as well as the warning in Marshall v. Gates that "litigants will be bound by [the Ninth Circuit's] interpretation of the consistency of the Local Rules with Rule 56(c)." 44 F.3d 722, 725 (9th Cir. 1995). It is also clear that Henry did not comply with the Court's February 6, 1995, order requiring him to file an opposition to the County Defendants' motion for summary judgment no later than March 6, 1995. Finally, Henry failed to comply with Local Rule 230(c) with regard to filing an opposition to the State Defendants' motion for summary judgment which was due on March 6, 1995.

Thus, regardless of whether the sanction is imposed under Fed. R. Civ. P. 16(f) or the Court's inherent power, Henry's conduct is sanctionable under the higher standard established in Zambrano v. City of Tustin, 885 F.2d 1473, 1482 (9th Cir. 1989). The appropriate sanction for Henry's failure to timely file oppositions to the pending motions is spelled out in Local Rule 230(c): "No party will be entitled to be heard in opposition to a motion at oral arguments if written opposition to the motion has not been timely filed by that party." That sanction was imposed at the March 20, 1995, hearing when the Court denied Henry's request for oral

argument.[2]

B. Rule 56(f) motion

In lieu of filing a timely opposition to Defendants' motions for summary judgment calendared for hearing on March 20, 1995, Henry filed a request for a continuance under Fed. R. Civ. P. 56(f).[3]

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[2]Although the Court did not issue an Order to Show Cause for Plaintiff's failure to timely file an opposition to the State Defendants' motion for summary judgment in accordance with Local Rule 230(c), the Court nonetheless determined a sanction was appropriate based on Plaintiff's response to the earlier order to Show Cause. See Marshall, 44 F.3d at 725 ("For violation of the local rule the district court will be free to devise such sanctions as seem appropriate"). Even assuming an Order to Show Cause was required before such a sanction could be imposed, the failure to issue an Order to Show Cause was not prejudicial. Oral argument based on Plaintiff's opposition to the motion would not have been helpful.

[3]Federal Rule of Civil Procedure 56(f) provides as follows:

> When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

To obtain a continuance pending further discovery, the opposing party's declaration should show the following: (1) facts establishing a likelihood that controverting evidence may exist as to a material fact; (2) specific reasons why such evidence could not previously have been obtained; and (3) steps or procedures through which the opposing party intends to obtain such evidence. VISA v. Bankcard Holders, 784 F.2d 1472 (9th Cir. 1986). Facts, not conclusions, are required. Keebler Co. v. Murray Bakery Products, 866 F.2d 1386 (Fed. Cir. 1989). Moreover, the party seeking a Rule 56(f) continuance must establish that he or she has not been dilatory. Patty Precision v. Brown & Sharpe, 742 F.2d 1260, 1264 (10th Cir. 1984).

Defendants' oppose the Rule 56(f) motion on several grounds. First, Defendants argue, in essence, that Henry is not entitled to additional time within which to conduct discovery because he has not been diligently pursuing discovery. Defendants argue that Henry filed his first Rule 56(f) motion because he had not conducted any discovery to that point. Defendants further contend that after being served with the present motion an December 30, 1994, Henry did not begin any discovery until he served his notice of depositions and requests for production of documents on March 3, 1995. Finally, Defendants note that Henry finally initiated discovery by setting depositions for March 28-30, one week after the pending motion was calendared for hearing. The Court is mindful of the pendency of this action since December 30, 1993, and Henry's failure to conduct discovery or to explain

why discovery was not previously conducted. Defendants contend that Henry's lack of diligence is sufficient reason for denying his Rule 56(f) motion. United States v. Wilson, 881 F.2d 596, 601 (9th Cir. 1989).

Defendants also argue Henry is not entitled to relief under Rule 56(f) because he has not filed affidavits setting forth the particular facts expected from discovery. The only affidavit presented was offered in support of his February 6, 1995, Rule 56(f) motion. In that affidavit, Henry stated he needed to conduct "additional', discovery regarding an alleged statement by Mrs. Henry concerning whether he was suicidal at the time he was booked. However, that declaration does not state how that information would preclude summary judgment.[4] See Continental Maritime v. Pacific Coast Metal Trades, 817 F.2d 1391, 1395 (9th Cir. 1987). Henry does not provide any information concerning other desired discovery or how the information sought would impact the pending motion.

Additionally, Defendants argue Henry has not met the requirements of Local Rule 142(d) since he did not file his Rule 56(f) motion "as soon as the need for an extension

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[4]As discussed below, Plaintiff only asserts a municipal liability claim for conduct occurring in the Shasta County Jail and he fails to provide evidence to support such a claim. See infra section III.C.3. Therefore, even assuming Plaintiff's evidence would warrant a finding that the individual officers violated his constitutional rights by placing him in the "safety cell" without legal justification, that' evidence is nonetheless insufficient to hold the municipality liable.

[became] apparent." Defendants argue that Henry has known that he needed to conduct discovery since he was served with the County Defendants' motion for summary judgment in late December 1994. Therefore, they contend his Rule 56(f) motion is untimely since it was not filed until March 6, 1995.

Finally, Defendants contend that Henry's "reasons" for seeking the continuance are insufficient. Henry argues he needs additional time to respond to the motion because co-counsel are no longer able to work on the case and the only remaining counsel had a prearranged vacation, specifically, Henry's counsel, Erik Berg, states he first learned that one of his co-counsel was terminated from her employment immediately before the opposition was due. He also states that this co-counsel was responsible for filing Henry's opposition to the motion for summary judgment. Mr. Berg also states that his other co-counsel has recently retired and is unable to assist him. In opposition, Defendants argue that these changes do not relieve any counsel of their obligation under the law and rules of this Court and that Mr. Berg's vacation does not warrant a continuance.

Henry has not carried his burden justifying a continuance under Rule 56(f). Therefore, Henry's request for a continuance is denied.

C. Summary Judgment

1. State of California

The State of California moves for summary judgment on Henry's claim that he was unlawfully arrested by arguing

that it is immune from suit under the Eleventh Amendment and is not a person within the meaning of 42 U.S.C. § 1983. See Will v. Michigan, 491 U.S. 58, 64-65 (1989) (state is not a person within the meaning of § 1983); Mitchell v. Los Angeles Community College Dist.., 861 F.2d 198, 201 (9th Cir. 1988), cert. denied, 490 U.S. 1081 (1989) (Eleventh Amendment provides state with immunity from § 1983 claims). Based on those authorities, the State's motion is granted.

2. Officers Chaidez and Smith

The individual CHP officers, Officers A.C. Chaidez and H. Smith, move for summary judgment by arguing that they did not violate Henry's constitutional rights when they arrested him and took him into custody after he failed to sign the notice to appear and demanded to be brought before a Magistrate. In framing the disputed issue in suit, the CHP officers rely on Henry's statement in his supplemental brief on class certification in which Henry represented that he was not challenging the relevant statutory scheme on its face, but rather challenging the statute as applied. Separate Statement of Undisputed Material Facts in Support of Motion of or Summary Judgment, Ex. of P. 3:17-22.

"Under federal law, stipulations and admissions in the pleadings are generally binding on the parties and the Court." Brown v. Tennessee Gas Pipeline Co., 623 F.2d 450, 454 (6th Cir. 1980). "Judicial admissions are formal admissions in the pleadings which have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the

fact." American Title Ins. Co. v. Lacelaw Corn., 861 F.2d 224, 226 (9th Cir. 1986) (quoting In re Fordson Engineering Corp., 25 B.R. 506, 509 (Bankr. E.D. Mich. 1982)). "For purposes of summary judgment, the courts have treated representations of counsel in a brief as admissions even though not contained in a pleading or affidavit." Id. Whether statements of fact contained in a brief will be treated as an admission rests with the discretion of -the district court. Id. at 227. Henry's statement is a judicial admission, limiting the dispute to an "as-applied" challenge to the relevant statutes and dispenses with the need to reach the issue of the constitutionality of the statutes themselves.

Moving to the merits of the motion, the individual Defendants argue that Henry fails to plead a claim under § 1983 because the "mere 'fact' . . . that officer Chaidez had available to him other alternatives utterly fails to establish grounds to support an allegation that the officer's failure to choose one of those alternatives somehow violated plaintiff's constitutional rights . . . . State Defendants' Memorandum in Support of Motion for Summary Judgment, P. 9:8-12. Henry fails to establish the availability of other alternatives. Further, the undisputed facts fail to show that either Defendant Chaidez or Smith violated Henry's constitutional rights.

It is undisputed that Henry did not sign the notice to appear and instead demanded to be brought before a Magistrate. It is further undisputed that Henry was taken into custody pursuant to Cal. Veh. Code § 40302 which requires an officer to bring an individual before a Magistrate upon

refusing to give his written promise to appear in court or upon demand for an immediate appearance before a Magistrate. See also Cal. Pen. Code § 853.5 ("in any case in which a person is arrested for an offense declared to be an infraction, the person may be released . . . . Only if the arrestee refuses to sign . . . a written promise [to appear] may the arrestee be taken into custody."); United States v. Moto, 982 F.2d 1384, 1388-89 (9th Cir. 1993). Moreover, it is undisputed that Cal. Veh. Code § 40307 provides that "when an arresting officer attempts to take a person arrested for a misdemeanor or infraction of this code before a magistrate and the magistrate or person authorized to act for him is not available, the arresting officer shall take the person arrested, without unnecessary delay, before . . . (b) the officer in charge of the most accessible county or city jail . . ." Finally, the record establishes that no Magistrate was available at the time of Henry's request.[5] Henry Depo. p. 31:11-14; State Defendants' Separate Statement of Undisputed Material Facts in Support of Motion for Summary Judgment, Ex. B, p. 2 Ex. C. Thus, the record discloses that Henry was taken into custody and transported to the Shasta County Jail pursuant to state law. Since Henry does not challenge the constitutionality of the relevant statutes, the facts demonstrate that Defendants Chaidez and Smith are entitled to summary judgment.

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[5]Although Plaintiff disputes whether a Magistrate was available, he does not provide any evidence to create a genuine issue of fact on this point. See Plaintiff's Statement of Genuine Issues in Support of Motion to Continue and in opposition

3. County Defendants

The County of Shasta and Sheriff Jim Pope (County Defendants] also move for summary judgment by arguing that Henry fails to establish a violation of his constitutional rights or, alternatively, fails to establish municipal liability with regard to his treatment at the Shasta County Jail.[6] It is well settled that a public entity may not be held liable under § 1983 on a respondeat superior basis for the wrongful acts or omissions of its employees. Monell v. Department of Social Services, 436 U.S. 658, 691 (1978). To be liable under §

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[6]Defendant Pope moves for summary judgment on the assumption that he is sued only in his official capacity. County Defendants' Memorandum of Points and Authorities in Support of Motion for Summary Judgment, p. 18:24. Plaintiff does not contradict this statement in his opposition.

Nonetheless, even if Defendant Pope were sued in his personal capacity, Plaintiff fails to provide evidence upon which liability could be imposed. Supervisory officers are not liable for actions of subordinates under § 1983 on any theory of vicarious liability. See generally 2 Joseph G. Cook and John L. Sobieski, Jr., Civil Rights Actions ¶ 7.09 (1993). A supervisor can be held liable, however, if he personally participated in or had direct responsibility for alleged violations. See Hansen v. Black, 885 F.2d 642, 646 (9th Cir. 1989) ; McDowell v. Jones, 990 F.2d 433, 435 (8th Cir. 1993); Isidore Silver, Police Civil Liability, § 8.07[2] (1994). Additionally, liability under §S 1983 will attach if a superior knows of the unlawful acts of the subordinate yet fails to intercede in the face of the constitutional violation. Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989) ; see also 2 Joseph G. Cook and John L. Sobieski, Jr. , Civil Rights Actions 1 7.09 (1993) Isidore Silver, Police Civil Liability, § 8.07[1] (1994).

1983, the public entity must have caused the deprivation of civil rights through its official policies, practices, or customs, or its knowing, deliberate indifference to those practices. Id. at 694.

In support of their motion, the County Defendants point to the lack of evidence concerning a policy, practice or custom of violating individuals' First, Fourth, Fifth, Eighth or Fourteenth Amendment rights. See Henry Depo. pp. 77:7-78:7. Henry fails to come forward with any evidence to support a municipal liability claim. Thus, even assuming there are disputed issues of fact with regard to the constitutionality of Henry's treatment at the Shasta County Jail, Henry fails to establish a basis for municipal liability. Therefore, the County Defendants" motion for summary judgment is granted.

D. Motion to Stay

Finally, Henry requests a stay of this action pending the outcome of his interlocutory appeal concerning the denial of his request for a preliminary injunction. Henry fails to provide persuasive authority warranting a stay under the circumstances. Further, Henry fails to specify the issues which he believes this Court lacks jurisdiction to consider. Therefore, the motion to stay is denied.

IV. Conclusion

For the foregoing reasons, Henry's requests for a

continuance under Fed. R. Civ. P. 56(f) and a stay of these proceedings are denied. Defendants' motions for summary judgment are granted. The Clerk is directed to enter judgment in favor of Defendants.

IT IS SO ORDERED.

Date: /s/ August 11, 1995

/s/ Garland E. Burrell, Jr.
GARLAND E. BURRELL, JR.
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

Henry

v. CASE NUMBER: CIV S-93-2038 GEB PAN

The County of Shasta, et al

XX -- **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF 8/11/95.

Jack L. Wagner,
Clerk of the Court

ENTERED: August 11, 1995

by: /s/ Gordy DeNecochea
R Gordy DeNecochea, Deputy Clerk

APPENDIX D

- RELEVANT STATUTORY PROVISIONS

California Vehicle Code § 40307
Page 59

California Vehicle Code § 40307

When the arresting officer attempts to take a person arrested for a misdemeanor or infraction of this code before a magistrate and the magistrate or person authorized to act for him is not available, the arresting officer shall take the person arrested, without unnecessary delay, before:

(a) The clerk of the magistrate who shall admit him to bail according to a schedule fixed as provided in Section 1269b of the Penal Code, or

(b) The officer in charge of the accessible county or city jail or other place of detention within the county who shall admit him to bail in accordance with a schedule fixed as provided in Section 1269b of the Penal Code or may, in lieu of bail, release the person on his written promise to appear as provided in subdivisions (a) through (f) of Section 853.6 of the Penal Code.

Whenever a person is taken into custody pursuant to subdivision (a) of Section 40302 and is arrested for a misdemeanor or infraction of this code pertaining to the operation of motor vehicle, the officer in charge of the most accessible county or city jail or other place of detention within the county may detain the person arrested for a reasonable period of time, not to exceed two hours, in order to verify his identity.

APPENDIX E

RELEVANT STATUTORY PROVISIONS

California Penal Code § 853.5
Page 60

California Penal Code
Chapter 5C § 853.5 Infractions, release procedures

Except as otherwise provided by law, in any case in which a person is arrested for an offense declared to be an infraction, the person may be released according to the procedures set forth by this chapter for the release of persons arrested for an offense declared to be a misdemeanor. In all cases, except as specified in Sections 40302, 40303, 40305, 40205.5 of the Vehicle Code, in which a person is arrested for an infraction, a peace officer shall only require the arrestee to present his drivers license or other satisfactory evidence of his identity for examination and to sign a written promise to appear. Only if the arrestee refuses to present such identification or, refuses to sign a written promise may arrestee be taken into custody.

APPENDIX F

RELEVANT STATUTORY PROVISIONS

15 CCR § 1207
Page 61

BARCLAYS OFFICIAL CALIFORNIA
CODE OF REGULATIONS
Title 15. Crime Prevention and Corrections
Division 1. Board of Corrections
Chapter 1. Board of Corrections
Subchapter 4, Minimum Standards
for Local Detention Facilities
Article 10. Medical/Mental Health Services

§ 1207. Medical Receiving Screening.

With the exception of inmates transferred directly within a custody system with documented receiving screening, a screening shall be completed on all inmates at the time of intake. This screening shall be completed in accordance with written procedures and shall include but not be limited to medical and mental health problems, developmental disabilities, and communicable diseases, including, but not limited to, tuberculosis and other airborne diseases. The screening shall be performed by licensed health personnel or trained facility staff.

The facility administrator and responsible physician shall develop a written plan for complying with Penal Code Section 2656 (orthopedic or prosthetic appliance used by inmates).

There shall be a written plan to provide care for any

inmate who appears at this screening to be in need of or who requests medical, mental health, or developmental disability treatment.

Written procedures and screening protocol shall be established by the responsible physician in cooperation with the facility administrator.

APPENDIX G

RELEVANT STATUTORY PROVISIONS

California Penal Code § 825
Page 63

Appearance before magistrate; unnecessary delay; maximum time; right of attorney to visit prisoner; officer refusing to permit visit, offense, forfeiture

The defendant must in all cases be taken before the magistrate without unnecessary delay, and, in any event, within two days after his arrest, excluding Sundays and holidays; provided, however, that when the two days prescribed herein expire at a time when the court in which the magistrate is sitting is not in session, such time shall be extended to include the duration of the next regular court session on the judicial day immediately following.

After such arrest, any attorney entitled to practice in the courts of record of California, may, at the request of the prisoner or any relative of such prisoner, visit the person so arrested. Any officer having charge of the prisoner so arrested who willfully refuses or neglects to allow such attorney to visit a prisoner is guilty of a misdemeanor. Any officer having a prisoner in charge, who refuses to allow any attorney to visit the prisoner when proper application is made therefor, shall forfeit and pay to the party aggrieved the sum of five hundred dollars ($500), to be recovered by action in any court of competent jurisdiction.

(2)

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No. 97-1950

In The

Supreme Court of The United States

October Term 1997

JIM POPE, as Sheriff, et al.

Petitioners,

v.

ROLLAND RICHARD HENRY

Respondent.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

INTRODUCTION 1

FACTS OF THE CASE 4

I. THE COURT OF APPEALS DID NOT HOLD THAT POST-EVENT EVIDENCE BY ITSELF IS SUFFICIENT TO PROVE A CLAIM UNDER 42 U.S.C. SECTION 1983 7

A. EVENTS *PRIOR* TO MR. HENRY'S ARREST 8

B. EVENTS OCCURRING *DURING* MR. HENRY'S INCARCERATION 9

C. EVENTS OCCURRING *AFTER* MR. HENRY'S RELEASE FROM CUSTODY.11

1.INCIDENTS INVOLVING MR. BURNS AND MR. MAY 12

2.JAIL PERSONNEL WERE STILL EMPLOYED IN THE JAIL OVER A YEAR AFTER THE SUIT WAS FILED 13

II. SUMMARY JUDGMENT FOR PETITIONERS WAS PROPERLY REVERSED 14

III. THE DECISION OF THE COURT OF APPEALS FOLLOWS ESTABLISHED LAW 17

A. THE COURT OF APPEALS DECISION DOES NOT CONFLICT WITH OTHER CIRCUITS 18

B. THE COURT OF APPEALS DECISION APPLIES THE ELEMENT OF "DELIBERATE INDIFFERENCE" 22

C. THE COURT OF APPEALS DECISION WILL NOT PRECLUDE SUMMARY JUDGMENT OF NON-MERITORIOUS MUNICIPAL LIABILITY ALLEGATIONS 23

D. THE COURT OF APPEALS DECISION WAS CONSISTENT WITH JILL BROWN 24

CONCLUSION 26

TABLE OF AUTHORITIES

CASES

Anderson v. United States, 417 U.S. 211, 219,
94 S.Ct. 2253, 2260, 41 L.Ed. 2d 20 (1974) 22

Andrews v. Fowler, 98 F.3d 1069, 1075
(8th Cir. 1996) 18, 20

Bd. Of County Commissioners v. Jill Brown,
520 U.S. 397 (1997) 1-4, 24, 25

Bordanaro v. McLeod, 871 F.2d 1154,
1166-1167 (1st Cir. 1989) 20

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 15, 16

City of St. Louis v. Praprotnik, 485 U.S. 112
(1988) 21

Fundiller v. City of Cooper City, 777 F.2d
1436, 1443 (11th Cir. 1985) 18, 19

Grandstaff v. City of Borger, 767 F.2d 161
(5th Cir. 1985) 20, 21

Henry v. County of Shasta, 132 F.3d 512
(9th Cir. 1997) 4

Houston v. Bryan, 725 F.2d 516, 518
(9th Cir. 1984) 17

Jones v. City of Chicago, 787 F.2d 200,
207 n. 8 (7th Cir. 1986) 18, 19

Kibbe v. City of Springfield, 777 F.2d 801
(1st Cir. 1985) 11

Larez v. City of Los Angeles, 946 F.2d 630,
645 (9th Cir. 1991) 21

Matsushita Elec. Indus. Co. v. Zenith Radio
Corp., 475 U.S. (1986) 15

McDonnell Douglas Corp. v. Green, 411 U.S. 792,
802, 93 S.Ct. 1817, 1824, 36 L. Ed. 2d 668 (1973) 22

McRorie v. Shimoda, 795 F.2d 780 (9th Cir. 1986) 21

Monell v. Department Of Soc. Servs.,
436 U.S. 658, 694 (1978) 2, 3, 8, 11, 25

Nacimiento Realty Co. v. San Luis Obispo, 841
F.2d 872 (9th Cir. 1987) 14

Parrish v. Luckie, 963 F.2d 201, 204
(8th Cir. 1992) 18, 20

Smolen v. Deloitte, Haskins & Sells, 921
F.2d 959, 963 (9th Cir. 1990) 14

Wright v. Sheppard, 919 F.2d 665,
674-675 (11th Cir. 1990) 18, 19

FEDERAL STATUTES

42 U.S.C. Section 1983 ..... *passim*

STATE STATUTES

California Vehicle Code section 40302 5

California Penal Code section 810 5

OTHER AUTHORITIES

Moore's Federal Practice, Section 56.41[3] [a],
p. 56-299 (3d ed. 1998) 15

Moore's Federal Practice, Section 56.13[2]
p. 56, 144-145 15

2 Wigmore, Evidence Sections 382, 437
(Chadbourn rev. 1979) 22

Introduction

To justify why this Court should grant certiorari, petitioners contend that the United States Court of Appeals held that post-event evidence is sufficient to prove an official policy or custom in violation of 42 U.S.C. Section 1983 in the absence of other evidence that the municipal policymaker was aware of post-event incidents and did nothing to end them. (Petition For Writ Of Certiorari at page stating "Question Presented") Petitioners contend that said holding conflicts with a decision of this Court, Bd. Of County Commissioners v. Jill Brown, 520 U.S. 397 (1997). Therefore, petitioners contend the decision of the Court of Appeals must be reversed.

Petitioners are mistaken. The Court of Appeals did not issue a new rule of law. Nor did it issue a "doctrine" (Petition For Writ Of Certiorari at page 5, referring to the supposed rule as "the post-event doctrine"). The Court of Appeals did not hold that post-event evidence standing alone is sufficient to prove a claim under section 1983. Nor did the Court of Appeals "expand" the law. The Court Of Appeals applied the law. It followed the law. Accordingly, petitioners' premise is wrong. Their reasons for granting certiorari are without foundation.

Assuming for the sake of argument that the Court of Appeals *did* state a new rule on post-event evidence, it did so in the context of a motion for *summary judgement* to determine whether there exist triable issues of material fact to justify sending the case to a jury. And even if it did state a

new rule, it did not apply that rule in a vacuum or consider post-event evidence to the exclusion of other evidence. It looked at *all* the evidence -- before the event, during the event, and after the event, including post-event evidence that petitioners ignored and failed to mention in their Petition For Writ Of Certiorari [1] -- and found triable issues of material fact under the principles of municipal liability set down by this Court in Monell v. Department of Soc. Servs., 436 U.S. 658, 694 (1978). The Court of Appeals' holding was not inconsistent with, but was perfectly in line with, traditional rules of liability under section 1983.

In Jill Brown this Court did not set a new or higher standard of municipal liability under section 1983. It adhered directly, and repeatedly cited to, the principles established in Monell. It reaffirmed the very case -- Monell -- on which the Court of Appeals in the instant case based its decision. In Jill Brown the issue was ". . . whether, under Monell and subsequent cases, a *single* hiring decision by a county sheriff can be a 'policy' that triggers municipal liability." 117 S. Ct. at 1388. (emphasis added) Jill Brown was an "inadequate screening case." 117 S. Ct. at 1391. It looked at *pre-event evidence* -- the decision to hire the reserve deputy in that case -- and decided on the facts before it that such an event -- which this Court characterized as a "single hiring decision" -- without more, did not prove the municipality's deliberate

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[1] Petitioners ignore and have failed to mention in their Petition For Writ Of Certiorari *all* of the post-event evidence that the Court of Appeals considered, as explained more fully below.

indifference to plaintiff Jill Brown's constitutional rights.[2] The import of Jill Brown was to make sure that it was clearly understood that the bar for municipal liability under section 1983 had not been lowered; that it was not now easier to establish the basis for municipal liability on the basis of a *single hiring decision*.

The foregoing point is important because the Court of Appeals in the instant case held scrupulously to the rules set down in Monell and at every turn in a *series of events* involving pre-event evidence, event evidence, and post-event evidence examined whether in this case under the *summary judgment* standard there was a triable issue of material fact respecting the issue of *deliberate indifference* and whether " . . the unlawful actions of its employees or agents were taken

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[2]This Court said, "A plaintiff must demonstrate that a municipal decision reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision. Only where adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federal protected right can the official's failure to adequately scrutinize the applicant's background constitute 'deliberate indifference.'" 117 S. Ct. at 1392. In the following paragraph the Court elaborated on the point: ". . .a finding of culpability simply cannot depend on the mere probability that any officer inadequately screened will inflict any constitutional injury. Rather, it must depend on a finding that this officer was highly likely to inflict the particular injury suffered by the plaintiff. The connection between the background of the particular applicant and the specific constitutional violation alleged must be strong." 117 S. Ct. at 1392.

pursuant to that defendant's policies or customs. . ." (Opinion of the Court of Appeals set forth in Petition For Writ Of Certiorari, Apdx B, page B -17 [hereinafter, Apdx. B -__])[3] (emphasis added). All throughout the opinion the Court of Appeals looked at the very issues which this Court stressed in its decision in Jill Brown. Looking particularly at what happened to Mr. Henry on the night of his detention at the county jail, and *not* at other incidents afterward, the Court of Appeals found, ". . .a widespread pattern of abuse by numerous individuals rather than a single instance of mistreatment of a solitary officer." (Apdx. B - 27)

A sharp procedural difference demarcates this case from Jill Brown. Jill Brown reached this Court on a full record after a *trial by jury*. The instant petition reached the Court of Appeals following a decision by the U.S. District Court granting *summary judgment* for petitioners as defendants. The difference is that on appellate review the Court of Appeals examines the record de novo in the light most favorable to the nonmoving party, who in this case is Mr. Henry. In doing so the Court of Appeals found for Mr. Henry and reversed.

Facts Of The Case

The facts of the case are summarized in detail in the opinion of the Court of Appeals (Apdx. B - 6-15) Plaintiff Rolland Henry, a motorist, was stopped by the California Highway Patrol for a tail light violation on May 13, 1993. The

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[3]Henry v. County of Shasta, 132 F.3d 512 (9th Cir. 1997)

officer issued Mr. Henry a ticket for the tail light violation and for failure to wear his seat belt. Mr. Henry declined to sign the ticket. Instead, Mr. Henry asked to be taken to a magistrate. Mr. Henry cited to the officer a provision in the California Vehicle Code[4] that, according to Mr. Henry, entitled him to be taken to a magistrate regardless of the time of day.[5] Mr. Henry was told to sign the ticket or go to jail. Mr. Henry continued to insist on a third option, that he be taken to a magistrate. Eventually, with a CHP Sergeant present, Mr. Henry was handcuffed and taken to the Shasta County Jail.

At the jail, Mr. Henry continually asked to be taken to a magistrate even when told by Sheriff's deputies, including a Sheriff's Sergeant, that he could be released on his own recognizance if he signed a promise to appear or posted $76.00 bail. After Mr. Henry continued to ask to be taken to a magistrate, he was booked into the jail. He was asked some medical questions by a Sheriff's deputy and a nurse, which he answered, but then asserted his right to remain silent until he was taken to a magistrate. The two would not tell Mr. Henry their names and he could not read their name tags because he did not have his glasses with him. A jail nurse then informed Mr. Henry his clothes would be removed and he would be placed in a rubber room unless he answered her questions. The nurse then ordered that Mr. Henry be taken to a hospital.

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[4]California Vehicle Code section 40302.

[5]California Penal Code section 810.

Mr. Henry's wife and the nurse talked on the phone. Their accounts differ as to what was said. The transport to the hospital and the visit itself occurred without incident.

After his return to the jail, Mr. Henry again refused to answer a nurse's questions. The nurse informed Sheriff's deputies she "wasn't going to fool with [him]." Mr. Henry was then placed in a rubber room with a plastic mattress but without sink or toilet. The floor was sticky and smelled of urine. Sheriff's deputies removed his clothes. He was thrown a blanket and placed on "suicide watch." Sheriff's deputies then removed Mr. Henry from the rubber room without his clothes. He was escorted naked to a booking cage in full view of male and female Sheriff's deputies. At the booking cage he was photographed. He continued to ask to be taken to a magistrate and refused to answer questions or sign anything until the condition was met. He was then returned to the same rubber room with the sticky floor and urine odor for the rest of the night.

The following morning, a deputy came to the room and Mr. Henry asked for a form habeas corpus petition, writing utensil, and a magnifying glass so that he could read the form. The Sheriff's deputy laughed, said "Yeah, right," and told Mr. Henry he had no rights as long he was in that room. Mr. Henry overheard the Sheriff's deputy repeat to other deputies his request for a habeas corpus petition and heard the other deputies laugh as well.

A different Sheriff's deputy came to the rubber room and informed Mr. Henry he was being kept in the room because he refused to answer questions and sign forms. The

Sheriff's deputy informed Mr. Henry he would be held in the rubber room naked indefinitely without being taken to a magistrate until he agreed to sign the paper. Mr. Henry, fearing for his health and safety, agreed "under threat" to the Sheriff's deputy's request. Still at this point Mr. Henry did not have his glasses. The deputy steered Mr. Henry's hand to the line on the form to sign. Mr. Henry signed the paper without knowing what it said. It was never read to him. He was told he would be returned to this room if he further refused to sign papers or answer questions.

At this point Mr. Henry was permitted to shower, get dressed and was moved to a clean jail cell. Later Mr. Henry was put through the booking process again and was reminded what would happen if he did not cooperate. A different Sheriff's deputy then told Mr. Henry that if he "pissed off" the judge and came back to the jail for any other reason than to be released he would be stripped naked and given a body cavity search. At 1:30 pm he was taken to a magistrate where he was arraigned. At his trial the charges against him were dismissed.

I. The Court Of Appeals Did Not Hold That Post-Event Evidence By Itself Is Sufficient To Prove A Claim Under 42 U.S.C. Section 1983

To create an issue where there is none, petitioners argue that the Court of Appeals articulated a new rule of law and rested its decision solely on that rule. Petitioners further contend that this so-called new rule conflicts with the law of this Court and with the law in other Circuits. Accordingly, they reason that certiorari must be granted to correct the

decision of the Court of Appeals. The new rule they say the Court of Appeals stated is that post-event evidence is sufficient to prove an official policy or custom in violation of 42 U.S.C. Section 1983, in the absence of other evidence that the municipal policymaker was aware of post-event incidents and did nothing to end them (Petition For Writ Of Certiorari at page stating "Question Presented").

Petitioners are incorrect. The Court of Appeals' decision in the instant case did not articulate a new rule of law. It did not hold that post-event evidence is sufficient, in the absence of other evidence, to prove an official policy or custom in violation of 42 U.S.C. Section 1983. The Court of Appeals did not look solely at post-event evidence. The Court said, "Those declarations [post-event] are by no means the only evidence Henry has offered to support his Monell claim, however." (Apdx. B - 25) The Court of Appeals looked at evidence from three time frames revolving around the facts of this case: *before* Mr. Henry's arrest, *during* his incarceration at the Shasta County Jail, and *after* his release from custody.

A. Events *Prior* To Mr. Henry's Arrest

The Court of Appeals' decision made specific reference to an incident that occurred prior to Mr. Henry's arrest in the instant case. The Court stated, "Finally, there is evidence in the record that Henry himself was placed in a rubber room at the jail in 1986 under substantially similar circumstances. The Prison Health Services record on Henry's detention in the "safety cell" in 1993 includes the following

notations [6]... Thus, there is evidence that a county policy of abusing persons stopped for minor infractions who refused to sign a ticket or demand to see a magistrate by throwing them naked into a "safety cell" *had been in existence since at least 1986.*" (Apdx. B - 28) (emphasis added) A page later, the Court stated, "That Henry himself encountered similar treatment some seven years before not only adds weight to his claims but also evidences that the policy was a longstanding one." (Apdx. B - 28)

B. Events Occurring *During* Mr. Henry's Incarceration

The Court of Appeal also relied on the events that occurred to Mr. Henry during his incarceration. Those facts are set forth *in detail* in the Court of Appeals' opinion (Apdx. B - 6-15) and are summarized in the instant Brief above. The Court of Appeals concluded, "The continuing threats Henry received from various sheriff's deputies, both before and after he complied with their demands, provide substantial evidence that the jail personnel were acting in accordance with a county policy encouraging or at least condoning flagrantly

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[6]"[Henry] was placed in [a medical "safety cell"] to [rule out] suicidal ideation & to observe. He appeared to sleep all night. Refused breakfast. Inmate did this in 1986 also. He was arrested because he refused to sign a "fix-it" ticket for a taillight as it "violates my constitutional rights." He was brought to jail. 1986 he did the same thing. Refused to answer med. questions." (Apdx. B - 28)

unconstitutional treatment of persons stopped for non-jailable offenses who refuse to sign notices to appear or demand to be taken before a magistrate. In short, the evidence of the officials' conduct strongly suggests that Henry's treatment resulted from *a widespread pattern of abuse* by numerous individuals *rather than a single instance of mistreatment by a solitary officer*." (Apdx. B - 26-27)[7] (emphasis added)

Petitioners contend that the County of Shasta and Sheriff Jim Pope are not liable under section 1983 merely because they employ tortfeasors (Petition For Writ Of Certiorari at page 4). Petitioners also contend that plaintiff in the instant case failed to submit at least some evidence

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[7]The Court of Appeals pointed out that: "(1)a sheriff's deputy not only refused to provide him with the materials he requested in order to prepare a habeas petition – materials to which he had a right under clearly established federal law [citations omitted] – but also repeated the request to various other jail personnel, who merely laughed and did not take any steps to comply with the request; (2) even after Henry ultimately told a second deputy that he would cooperate, and signed the statement placed before him (which he made clear he could not see to read and which was not read to him), that deputy twice threatened that if he did not continue to cooperate he would be put back in the "safety cell;" and (3) a third deputy later warned Henry "that if [he] "pissed off" the judge and came back down to the jail for any other reason than to be released, that [he] would be stripped naked, receive a body cavity search and be placed back in the solitary confinement cell." (Apdx. B - 25-26) The Court of Appeals further noted that "A body cavity search of Henry under those circumstances not only would have been unconstitutional, but also would have violated subsections (f) and (h) of Cal. Penal Code Section 4030." Footnote 14 of Opinion.

demonstrating deliberate indifference on the part of Sheriff Jim Pope and the County of Shasta concerning his detention. (Petition For Writ Of Certiorari at pp. 6-7) The Court of Appeals addressed this issue. It stated, "In view of all of the facts and circumstances of Henry's confinement, there is adequate evidence to suggest that the violations of his constitutional rights were not the result of a few officers acting on a lark or in violation of the orders or policies that governed their conduct. The fact that so many officials participated in the manner they did in the unconstitutional abuse of Henry throughout the period of his detention is thus further substantial evidence in support of his Monell claim. See e.g. Kibbe v. City of Springfield, 777 F.2d 801 (1st Cir. 1985) (conduct of ten officers, three of whom fired shots, during attempted apprehension of suspect was sufficient to support verdict against city on Monell claim)." (Apdx. B - 27)

C. Events Occurring *After* Mr. Henry's Release From Custody

Finally, the Court of Appeals based its decision on post-event evidence. Petitioners contend the Court of Appeals looked solely to post-event incidents involving Mr. Burns and Mr. May. They ignore and fail to mention other post-event evidence which the Court of Appeals also considered: that deputies and medical staff who mistreated plaintiff Henry were still employed in the jail when the County of Shasta and Sheriff Jim Pope filed their motion for summary judgment.

This latter point – that the Court of Appeals took into consideration that the perpetrators were still employed at the jail a year later – is significant here because it obviously factored into the Court of Appeals' decision and because it was probative of defendants' deliberate indifference to the constitutional rights of Mr. Henry.

1. Incidents Involving Mr. Burns And Mr. May

The Court of Appeals looked at two incidents which occurred after Mr. Henry's release from jail. The Court stated, "May and Burns each described being subjected to treatment at the Shasta County Jail virtually identical to Henry's after they were stopped for what were at worst only minor traffic infractions." (Apdx. B -18-19) The Court of Appeals then examined each declaration. (Apdx. B - 19-22)

The Court of Appeals noted that the incident involving Mr. Burns occurred ". . . two to three months after Henry filed the instant section 1983 action. . . It is a reasonable inference – indeed, the only reasonable inference – that after Henry filed suit and successfully served process against the county, it knew about the alleged malfeasance of its employees at the jail." (Apdx. B - 19-20) The Court of Appeals went on to note that:

> "...surely its failure even after being sued to correct a blatantly unconstitutional course of treatment – stripping persons who have committed minor traffic infractions, throwing

them naked into a "rubber room" and holding them there for ten hours or more for failing to sign a traffic ticket or asserting their legal right to be brought before a magistrate – is even more persuasive evidence of deliberate indifference or of a policy encouraging such official misconduct." (Apdx. B - 25)

The Court noted that:

"May's detention occurred only two and one-half months after Henry's. Such close proximity in time of the two events lends further support to Henry's claim that his treatment was not an isolated event but was instead inflicted in accordance with county policy." (Apdx. B - 21-22)

2. Jail Personnel Were Still Employed In The Jail Over A Year After The Suit Was Filed

The Court of Appeals was struck by an additional consideration which petitioners ignore and make no mention of in their Petition For Writ Of Certiorari: deputies and medical staff who mistreated plaintiff Henry were still employed in the jail when the County of Shasta and Sheriff Jim Pope filed their motion for summary judgment. The Court of Appeals stated, "We note also that, although there is no record at this stage of the proceedings as to whether

disciplinary proceedings were ever held, it does appear from the declarations submitted by the defendants that at least some and perhaps all of the individuals responsible for violating Henry's rights are still employed in their former capacities at the Shasta County Jail." (Footnote 13, Apdx. B - 25) In other words, the people who violated the Constitutional rights of Messrs. Henry, Burns and May were still employed in the jail over a year later -- when the motion for summary judgment was filed – and remained in a position to violate the rights of future minor traffic offenders who might be brought to the jail for refusing to sign a traffic ticket.[8]

II. Summary Judgment For Petitioners Was Properly Reversed

It is important to keep in mind that the instant case is before this Court on the trial court's summary judgment for petitioner-defendants as moving parties. The Court of Appeals reviewed the judgment de novo[9] and reversed. This is a procedural wrinkle that petitioners fail to account for in

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[8]That the same personnel were still working in the jail a year later takes on added significance in light of Judge Rymer's observation, at the very outset of her dissent, that "The issue in this is not whether Henry's treatment at the Shasta County Jail was awful: it was awful." (Judge Rymer's dissent, Apdx. B - 33)

[9]The Court of Appeals reviews a trial court order granting summary judgment de novo. E.g. Nacimiento Realty Co. v. San Luis Obispo, 841 F.2d 872 (9th Cir. 1987); Smolen v. Deloitte, Haskins & Sells, 921 F.2d 959, 963 (9th Cir. 1990).

their legal analysis. When reviewing a U.S. District Court's decision de novo, the Court of Appeals reviews the evidence and all factual inferences in the light most favorable to the nonmoving party in determining whether a genuine issue of material fact exists, and whether the moving party is entitled to judgment as a matter of law. (Moore's Federal Practice, Section 56.41[3] [a], p. 56-299 (3d ed. 1998)) [hereinafter cited as Moore]

This Court's 1986 trilogy of summary judgment cases[10] requires the nonmoving party in a motion for summary judgment to identify for the court specific facts which articulate and illustrate the presence of a genuine issue requiring trial. (Moore, Section 56.13[2] p. 56, 144-145)[11]

In the instant case, the issue is not even close. There was substantial evidence in the record from which to conclude there were triable issues of material fact, for all of the reasons asserted under Part I of the this Brief, set forth above.[12]

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[10]Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. (1986).

[11]"However, a nonmoving party's own affirmation or deposition can constitute affirmative evidence to defeat a motion for summary judgement, even if it only contains denials." (Moore, Section 56.13[2] p. 56 - 147-148) Plaintiff Henry filed a detailed declaration in the instant case describing the event (Apdx. B-6, n.1).

[12]Petitioners complain that the Court of Appeals relied upon the declarations of May and Burns submitted by plaintiff in support of an earlier unsuccessful motion for class certification

Indeed, there was substantially *more* evidence in the record in the instant case than would have been required to defeat defendants' summary judgment motion. As noted, the evidence of "custom" or "policy" and "deliberate indifference" covered three broad time frames: before the event, during the event, and after the event. The Court of Appeals, reviewing the issue de novo, found overwhelming evidence not only from which to infer, but from which to *conclude*, that defendants acted with deliberate indifference to Mr. Henry's constitutional rights.

Nevertheless, it must be kept in mind that actions brought under section 1983 generally pit a single plaintiff, as here, a private citizen, Mr. Henry, against a formidable array of governmental and political forces, such as, here, the Sheriff of the County with his power to arrest, detain, and jail, and his power to intimidate, and the County of Shasta itself. The facts of the instant case demonstrate the very nature of the problem: Mr. Henry was held overnight in a jail, naked, without his glasses, and therefore unable to read name badges, under the control of Sheriff's deputies and medical personnel, some of whom refused to give their names when he asked for them. Thus, Mr. Henry's complaint filed in the U.S. District

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(Petition for Writ of Certiorari at page 4). However, a court looks at the entire record on file in the case in determining whether there is a genuine issue of material fact (Federal Rules of Civil Procedure 56(c)). Moreover, this Court said in Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986), "We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment."

Court understandably named Doe defendants.

When it came time to hear the motion for summary judgment, Mr. Henry was placed at an even greater disadvantage because his counsel was not permitted oral argument to contest petitioners' summary judgment motion.[13] Nevertheless, the record speaks for itself. It was wrong to grant summary judgment for petitioner-defendants.

III. The Decision Of The Court Of Appeals Follows Established Law

The Court of Appeals did not hold that post-event evidence is sufficient to prove an official policy or custom in violation of 42 U.S.C. Section 1983 in the absence of other evidence that the municipal policymaker was aware of post-event incidents and did nothing to end them. Accordingly,

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[13]Petitioners allude to the fact that "sanctions were imposed" without saying what the sanctions were. (Petition For Writ Of Certiorari at page 3) A $50.00 sanction was imposed in 1994 for non-compliance with a local rule. A substantially more severe sanction was imposed at the hearing on the motion for summary judgment for a second violation of a local rule. The sanction was that Mr. Henry's trial counsel was not allowed to be heard orally, and to argue against, petitioners' motion for summary judgment. The Court of Appeals for the Ninth Circuit has stated, ". . . we admonish trial courts to grant oral argument on nonfrivolous summary judgment motions . . ." Houston v. Bryan, 725 F.2d 516, 518 (9th Cir. 1984) In refusing to grant oral argument to Mr. Henry, and thereafter ruling against him, the trial court may well have abused its discretion and invited scrutiny of its decision, and of the record as a whole, by the Court of Appeals.

the entire premise for petitioners' Petition For Writ Of Certiorari is wrong. It follows that each of their mini-reasons for granting certiorari is without foundation. Therefore, the discussion that follows is essentially unnecessary.

A. The Court of Appeals Decision Does Not Conflict With Other Circuits

Petitioners contend that the decision of the Court of Appeals is in "conflict" with holdings from other circuit Courts of Appeals which "reject" the "post-event doctrine." Petitioners cite cases from the Seventh Circuit, Eighth Circuit and Eleventh Circuit[14] to support this proposition (Petition for Writ of Certiorari at page 4-5). Petitioners further contend that three other circuit Courts of Appeals, including the First Circuit, Fifth Circuit, and the Ninth Circuit itself, "recognize" a "limited application of the post-event rule" (Petition For Writ Of Certiorari at p. 5).

Mr. Henry respectfully submits petitioners' conclusion is the product of a highly imaginative reading of the cases cited by them. The case from the Eleventh Circuit, Wright v. Sheppard, 919 F.2d 665, 674-675 (11th Cir. 1990), impliedly *embraced* the admissibility of post-event evidence, and cited another Eleventh Circuit case, Fundiller v. City of Cooper

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[14]Petitioners cite: Andrews v. Fowler, 98 F.3d 1069, 1075 (8th Cir. 1996); Parrish v. Luckie, 963 F.2d 201, 204 (8th Cir. 1992); Jones v. City of Chicago, 787 F. 2d 200, 207 n. 8 (7th Cir. 1986); Wright v. Sheppard, 919 F.2d 665, 674-675 (11th Cir. 1990).

City, 777 F.2d 1436, 1443 (11th Cir. 1985), which *did* embrace the admissibility of such evidence. In Fundiller, the court reinstated the trial court's dismissal of a Section 1983 suit against the city's Public Safety Director on an allegation that he failed to take corrective steps although he was aware of police use of unlawful, excessive force. Evidence pointing to his alleged failure to take corrective steps would be post-event evidence and obviously the court was of the opinion such evidence was probative of plaintiff's Section 1983 claim against the Public Safety Director. In Wright, the court said plaintiff's allegations that the Sheriff in that case ratified the deputy's misconduct by failing to correct it, failed under the facts because the deputy resigned after the Sheriff investigated the alleged misconduct. 919 F.2d at 675. The court in Wright implied that had the deputy not resigned and had the Sheriff failed to correct the deputy's misconduct, such post-event evidence would be admissible on the Sheriff's culpability.

In the case from the Seventh Circuit, Jones v. City of Chicago, 787 F.2d 200, 207 n.8 (7th Cir. 1986), the court factually distinguished the "post-event evidence" tendered by the plaintiff in that case from the facts pertaining to plaintiff's claim. Plaintiff alleged a sexual assault by a city-employed physician during a pelvic exam. The post-event evidence consisted of complaints by other patients about "comments" the physician had made. The post-event complaints did not allege conduct of a sexual nature. The court in Jones did not rule out the admissibility of factually relevant post-event evidence, nor announce a rule rejecting such evidence out of

hand.

The two cases from the Eighth Circuit, Andrews v. Fowler, 98 F.3d 1069, 1075 (8th Cir. 1996) and Parrish v. Luckie, 963 F.2d 201, 204 (8th Cir. 1992), did not involve post-event evidence as far as respondent is able to tell. Neither case referred to "post-event" evidence and neither case expressed a repudiation of the admissibility of such evidence.

Thus, petitioners' attempt to set up a "split" within the circuits fails because they fail to demonstrate that the circuits mentioned take a side in the supposed "split."

As to the other side of the "split" -- the supposed pro-"post-event" side -- only one of the cases cited by petitioners – Bordanaro v. McLeod, 871 F.2d 1154, 1166-1167 (1st Cir. 1989) -- uses the term "post-event evidence." Moreover, its use of the term, and its invocation of the rule, can hardly be said to be a "limited application." (Petition For Writ Of Certiorari at page 5) In Bordanaro, the Court of Appeals cites Grandstaff v. City of Borger, 767 F.2d 161 (5th Cir. 1985) as authority for the use of such evidence. The Court of Appeals then points out:

> "The [United States Supreme] Court has never held that inferences about what customs or policies existed in a city before an event could not be drawn from subsequent actions. Post-event evidence can shed some light on what policies existed in the city on the date of an alleged deprivation of constitutional right."

871 F.2d at 1166-1167.

The Court of Appeals precedes this statement by a reference to this Court's decision in City of St. Louis v. Praprotnik, 485 U.S. 112 (1988). The Bordonaro court concludes that Praprotnik ". . . does not foreclose such use of post-event evidence." 871 F.2d at 1166.

The other two cases cited for the pro-"post-event" side of the "split" use post-event evidence but do not use the term "post-event evidence." Neither case expresses a doctrine or policy to limit the use of such evidence. Rather, the scope of its use does not appear to be an issue. See Larez v. City of Los Angeles, 946 F.2d 630, 645 (9th Cir. 1991); Grandstaff v. City of Borger, 767 F.2d 161, 171 (5th Cir. 1985). In Grandstaff the Court of Appeals used the term "subsequent conduct" and "conduct after the events of that night." 767 F.2d at 171. The Court of Appeals in Larez simply cited Grandstaff without applying a specific term. Larez cited a second case as well, McRorie v. Shimoda, 795 F.2d 780 (9th Cir. 1986), a case which also simply cited to Grandstaff.

Grandstaff was apparently the first case in any circuit to enunciate the principle in the context of section 1983 litigation that deliberate indifference could be inferred from subsequent conduct. As noted above, Grandstaff did not use the term "post-event evidence," but instead referred to "subsequent conduct" and "conduct after the events of that night." 767 F.2d at 171. Grandstaff did not derive the rule in a vacuum. It relied on Wigmore and two decisions of this Court: "The policymaker's disposition, his policy on the use of deadly force, after August 11 was evidence of his

disposition prior to August 11. See 2 Wigmore, Evidence Sections 382, 437 (Chadbourn rev. 1979). As subsequent conduct may prove discriminatory motive in a prior employment decision, see McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L. Ed. 2d 668 (1973), and subsequent acts may tend to prove the nature of a prior conspiracy, see Anderson v. United States, 417 U.S. 211, 219, 94 S.Ct. 2253, 2260, 41 L.Ed. 2d 20 (1974), so the subsequent acceptance of dangerous recklessness by the policymaker tends to prove his preexisting disposition and policy." 767 F.2d at 171.

Thus, the so-called "split" in the circuits is a fiction. It does not exist and therefore affords no basis for granting certiorari.

B. The Court of Appeals Decision Applies The Element Of "Deliberate Indifference"

Petitioners contend that the Court of Appeals trampled on the requirement that plaintiff show deliberate indifference toward plaintiff's constitutional rights, an essential element of a claim under section 1983 for purposes of municipal liability. (Petition For Writ Of Certiorari at page 6-7) This conclusion simply isn't supported by a reading of the Court of Appeals' decision. The Court of Appeals refers to this element of proof in the first sentence of the first paragraph of its discussion of the law (Apdx. B - 17) and refers to it again and again throughout its opinion. The Court of Appeals demonstrates throughout its opinion a series of events occurring prior to the

event, during the event, and after the event, that show petitioners' deliberate indifference toward Mr. Henry's constitutional rights. Those events are summarized above in Part I of the instant Brief.

C. The Court Of Appeals Decision Will Not Preclude Summary Judgment Of Non-Meritorious Municipal Liability Allegations

Petitioners contend that the Court of Appeals decision will preclude summary judgment of non-meritorious municipal liability allegations.(Petition For Writ Of Certiorari at page 7-9) Once again the problem with the argument is that it proceeds from the faulty assumption that the Court of Appeals adopted a rule and imposed a doctrine that it did not adopt and did not impose. Moreover, as pointed out above, Mr. Henry's claim against petitioners is meritorious. Thus, it is difficult to conclude that an appellate court opinion which says that a particular plaintiff's claim has merit somehow makes it harder for municipalities to defend against claims that do not have merit.

Petitioners' observation that jails have safety cells for inmates who behave in bizarre, self-threatening or violent ways is beside the point because Mr. Henry's behavior was not bizarre, self-threatening or violent. Petitioners' argument that the decision of the Court of Appeals will allow other plaintiffs to successfully oppose summary judgment simply by alleging similar incidents after their law suits are filed also

lacks merit because the Court of Appeals' decision did not point solely to events which occurred after his law suit was filed. The decision pointed to evidence before the event, during the event, and after the event. Thus there is nothing "expansive" about the decision the Court of Appeals announced.

D. The Court Of Appeals Decision Was Consistent With Jill Brown

Petitioners contend that the Court of Appeals' decision deviates from the causal link requirement as stated by this Court in Bd. Of County Commissioners v. Jill Brown, 520 U.S. 397 (1997). It does not.[15] The Court of Appeals refers to this element of proof in the first sentence of the first paragraph of its discussion of the law. It says, "A municipal defendant may only be held liable under section 1983 if the unlawful actions of its employees or agents were taken *pursuant to that defendant's policies or customs*." (Apdx. B - 17) (emphasis added) The phrase "pursuant to" is simply

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[15]This Court decided Jill Brown on April 28, 1997 and rehearing was denied on June 16, 1997. Oral argument in the instant case before the Court of Appeals occurred on December 12, 1996. The Court of Appeals issued its decision on December 23, 1997. As far as respondent is able to determine, petitioners waited until after the Court of Appeals issued its decision to inform it of this Court's decision in Jill Brown or to argue its applicability to the instant case. Petitioners filed a Petition For Rehearing And Suggestion For Rehearing En Banc and for the first time brought the Jill Brown decision to the Court of Appeals' attention.

another way of saying "moving force." The Court of Appeals was obviously aware of the requirement that there be a causal link. The case which it cites for the proposition that employees or agents act "pursuant to" a municipal defendant's policies or customs is Monell v. Department of Soc. Servs., 436 U.S. 658 (1978), the case which imposes the causal link requirement. Moreover, the Court of Appeals cites specifically to page 694 of this Court's decision in Monell, the page where this Court uses the term "moving force."

As noted at the very outset of this Brief, in Jill Brown this Court did not set a new or higher standard of municipal liability under section 1983. It adhered directly, and repeatedly cited to, the principles established in Monell. It reaffirmed the very case -- Monell -- on which the Court of Appeals in the instant case based its decision. Therefore, the decision of the Court of Appeals was consistent not only with Monell but with Jill Brown.

Conclusion

The Petition For Writ Of Certiorari lacks merit and should be denied.

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